No. (1)

Supreme Court, U.S.
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In the

Supreme Court of the United States

LAWRENCE ROCKWOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether a soldier charged with a crime is entitled to proceedings before a different commander and military unit when the conduct with which he is charged was undertaken to save civilian lives only after his own unit failed to take such action though exhaustively urged by the soldier to do so, placing the unit in a direct conflict of interest with the soldier.

2. Whether the failure of the military judge to compel the commanding officer of a division to testify where the failure denied the accused the testimony in support of his defenses and testimony demonstrating that the interests of the commanding officer were in sever conflict with those of the accused and that the witness was an "accuser" under military law violated the right of the accused to due process of law and compulsory process for obtaining witnesses in his favor violation of the Fifth and Sixth Amendments to the Constitution.

3. Whether a soldier's action to save lives of prisoners which he learned in the course of his duties were in grave life-threatening danger in the notorious Haitian national penitentiary after his command repeatedly failed to act on his requests through official channels for it to take protective action was wrongfully deprived in a court martial convened by his command to punish him for his action all in violation of military and federal law and the fifth amendment of his military and common law defenses of justification and necessity because the military judge refused to instruct the court martial on them and instead gave a confused hybrid instruction ostensibly on a military defense of duress that was incomprehensible and impossible to apply.

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Opinions Below

The opinion of the United States Court of Appeals for the Armed Forces is reported, 52 M.J. 98 (1999), A1, as is the opinion of the Army Court of Criminal Appeals, 48 M.J. 501 (1998), A41.

Basis for Jurisdiction

The judgment sought to be reviewed was entered on September 30, 1999. The jurisdiction of this Court is based on 28 U.S.C. §1259(1) and 10 U.S.C. §867a(a). The petition is timely filed pursuant to Sup.Ct.R. 13.1.

Constitutional Provisions, Statutes and Rules Involved

These authorities are set forth in the Appendix, A69, and listed in the Table of Contents.

Statement of the Case

The United Nations Security Council authorized military force, if necessary, and a peace keeping military occupation, if permitted by the military junta that seized power from President Aristide of Haiti, for the purpose of establishing a "secure and stable environment" in Haiti, protecting human rights and restoring its democratically elected government.

At the last moment, the Haitian military junta agreed to a peaceful occupation and return of the government to its democratically elected officials over a period of four weeks.

Major General Meade, Commander of the U.S. Army's 10th Mountain Division based at Ford Drum, New York, the Major military unit in the Joint Task Force that occupied Haiti, was designated commander of the Task Force's occupying troops. The first elements of the Joint Task Force entered Haiti without resistance on September 19, 1994.

Captain Rockwood, a fourth generation soldier in the

U.S. Army, served as an enlisted man for six years, left the service to earn a master's degree in military history and diplomacy, and returned to the service as a commissioned officer. In 1989 he entered military intelligence serving in Honduras and elsewhere in Central America. He joined the 10th Mountain Division in February 1994 as an intelligence officer. When the Division was alerted for duty in early August 1994, he requested and was assigned to counter intelligence with the support of his immediate superiors. He immediately began to create a data base from public and military sources. During the first week of August he and soldiers in his unit tried to locate the National Penitentiary in Port au Prince in performing map reconnaissance. He discovered the military had no data on prisons and political prisoners in Haiti, though he was aware that human rights organizations had long considered Haitian prisons to be among the worst in the hemisphere. At his request, Lt. Col. Bragg, commander of intelligence for the Division authorized a high priority request for intelligence information to the Defense Intelligence agency at the Pentagon on August 10 seeking among other information the number of prisoners and the percentage believed to be political prisoners at the National Penitentiary.

Based on all available information, Captain Rockwood believed those political prisoners would be imperiled in the event of the U.N. intervention, whether by force, or consent since they were both victims and most knowledgeable about human rights violations by the junta. He also believed conditions at the National Penitentiary and other prison facilities were life threatening.

Among Captain Rockwood's duties in August and early September was liaison with the 82nd Airborne Division based at Fort Bragg, North Carlina which would have led the military assault if the junta failed to agree to a permissive entry of occupying forces. He traveled between the two bases to analyze and help provide intelligence needs for both types of operations. Under either, the protection of supporters of President Aristide and prevention of politically motivated human rights violations

would be critical. A "secure and stable environment" and restoration of the democratically elected government required protection of the human rights of political supporters of President Aristide.

Captain Rockwood watched TV coverage of President Clinton's speech on Haiti from Ft. Bragg on September 15 in which the President said the number one priority of the mission would be "to stop the brutal atrocities." On the eve of the invasion President Clinton stated his first concern was the protection of the lives of U.S. troops, called "force protection" by the military. The tension between force protection and acts to protect Haitians from violence by the junta and its supporters became a central issue for the mission and in this case.

Captain Rockwood arrived in Haiti on September 23rd and reported to Col. Bragg. He accompanied a field operations intelligence team which included Haitian American soldiers gathering information about conditions throughout Port au Prince and surrounding areas from physical observations and from Haitians before beginning his first 12 hour duty shift.

Over a period of six days, he met daily with operations personnel gathering intelligence in the field, reviewed all counter intelligence reports and prepared daily intelligence summaries which included information gathered during the preceding twenty four hours concerning "low level" intelligence from the Haitian population and physical observation of the events that was relevant to stated "Priority Intelligence Requirements." The first priority was always force protection, but human rights violations called "Haitian on Haitian violence," was also a priority. Source reports usually contained very little information concerning force protection which Captain Rockwood reported first. There had been no U.S. military casualties and there were none while Captain Rockwood was in Haiti.

On his second shift he learned and reported Haitians were refusing to talk to uniformed U.S. military intelligence gatherers because of reprisals at night. He also learned that an Army operations team watched Haitians physically abduct Haitians in their immediate presence without intervening

because they believed the rules of engagement prohibited intervention unless participants were in uniform. He took this information to the Staff Judge Advocate's office and secured legal advice that it was "absolutely not" correct that intervention was not authorized unless some participants were in uniform which he transmitted to operations officers.

This incident followed by four days a scene at the sea port, which was secured by a 10th Mountain Division brigade, where Haitian police repeatedly beat Haitian crowds attempting to get food. One crippled man, a coconut vendor, was beaten to death as heavily armed U.S. soldiers watched. A Major who served on this court martial had command authority over the soldiers and stood 20 meters from the assault. The international media filmed the actions and interviewed soldiers from the Division who were furious that they were ordered to stand by and not intervene.

Concerned about prisons, Captain Rockwood went to the Civil Military Operations Center which had responsibilities for human rights in Haitian prisons and was told they were prohibited by law from interfering in prisons. He reported this to the Judge Advocate's office and was advised this was not correct. He advised Civil Military Operation officers of the Staff Judge Advocate opinion. Expert testimony at trial from a retired Army Major confirmed this opinion, citing Army Field Manual 41-10 as controlling.

Captain Rockwood was in regular contact with ranking officers in every office and operations center concerned with force protection and protecting the human rights of Haitians. All knew he was trying with increasing urgency to get operations personnel to inspect prisons and sites where Haitian bodies were being dumped and take appropriate action. He was told by such officers that his reports were important and he should continue. His immediate supervisor was concerned about prisons and believed the U.S. had to protect prisoners. Colonel Bragg, the commander for intelligence in both the 10th Mountain Division and the Joint Task Force knew there were human rights violations in the prisons and conditions were bad.

Early on September 28, Captain Rockwood received a report from a military unit operating outside Port au Prince and not part of the 10th Mountain Division which had discovered horrific conditions in a small prison in the town of Les Cayes where prisoners were dying. This confirmed his information and belief as to prison conditions. He gave copies of the report immediately to all concerned officers. The colonel in charge of the Special Operations Center on hearing Captain Rockwood describe the report said "we dropped the ball." Captain Rockwood immediately provided a list of five locations in the Port au Prince area including the National Penitentiary which he believed held many political prisoners.

The international media learned of the conditions discovered at the Les Cayes prison and there was a widespread reaction of outrage.

The 10th Mountain Division failed to produce the Les Cayes report at trial, though Captain Rockwood had personally delivered copies to five separate offices. Captain Rockwood's daily intelligence reports were also not produced, the Division claiming they could not be found. Captain Rockwood's senior non commissioned assistant testified the last reports charged the Division with being "derelict in our duty," and stated "U.S. forces can't do their mission out there."

On the evening of September 29, Captain Rockwood finally received a response to his high priority intelligence request for information about prisons from the Pentagon. It confirmed his information gathered from public sources, the daily reports he received, the Les Cayes report and other information he had as the intelligence officer most informed and concerned about the safety of Haitian prisoners.

He immediately distributed the report to all appropriate officers including Colonel Bragg. He was told there would be no prison investigations in the near future.

He then assembled copies of his daily reports, the Les Cayes report and the priority intelligence request report and delivered sets to all the Division and other officers he had been pressing to act on prisons, including his own superiors and the

Judge Advocate's office where he was told, "Great -- keep us informed."

On completing this delivery, he took a set of the papers to the Division's Inspector General where he stated "I'm making a complaint against my Command" and filed a complaint charging his command and its officers with failing to do their duty, citing the extensive efforts he had made to obtain action to protect human rights. His complaint cited international law, Army General Orders and Army Field Manual 27-10 incorporating duties under the Hague and Geneva Conventions, the Operations Plan for the U.N. Task Force, and the U.N. Security Council Resolution authorizing it. He had informed Division officers of other authority, as well, which required the Division to act to protect human rights and imposed an individual duty to act to protect lives where the Division failed to do so. He had done everything he possibly could to cause the 10th Mountain Division and the U.N. task force to act to save lives known to be at risk.

Captain Rockwood then proceeded in uniform alone and fully armed to the National Penitentiary. He believed that by personally observing and accounting for the prisoners there, he could protect them since prison officials could be called to explain what happened to any who disappeared, died, or were injured. This is a method known and used in the human rights community and a purpose of the prison inspection functions of the International Committee of the Red Cross. The Court Martial acquitted Captain Rockwood of all charges of leaving his post without authorization and dereliction in performance of his duties by leaving his post.

Captain Rockwood testified in his own defense. He fully described how he left the military compound located near the international airport without being detected in the late afternoon, proceeded to the National Penitentiary, slipped in, and without friction, or incident, observed about 100 prisoners out of a total he estimated to be near 500. There was no contrary evidence as to these events.

Among the prisoners he saw were a group of about

thirty in the infirmary who were in life threatening conditions. Many were on the floor unable to rise. All were emaciated. Several were recent amputees. Several seemed near death. Captain Rockwood was a licensed practical nurse and had served as a medic and mental health counselor during part of his service as an enlisted soldier. He was well qualified to evaluate the conditions of these prisoners.

The Warden, a Haitian Army Major, told Captain Rockwood that the remainder of the prison was locked down until morning, but he could come back to complete his account and that prisoners rolls would then be available to identify prisoners present. Fearing action would be taken overnight to remove prisoners and dispose of them, he said he would wait until morning and stationed himself in the prison yard by cells he could not enter.

His efforts to call his commander before his 8:00 p.m. shift failed because he could not get through to either the Army command, or the U.S. Embassy. The warden said he could get word through and Captain Rockwood gave him his name and asked that Colonel Bragg be notified where he was and that he could not finish his task before the next morning.

After he had been in the prison yard about three hours, the military attache at the U.S. Embassy, a Marine Corps Major, arrived alone in civilian clothes. The military attache testified that Captain Rockwood cursed the president, General Meade and others and created a dangerous situation by the way he clutched his rifle. Captain Rockwood firmly denied these charges. The Court martial acquitted Captain Rockwood of these charges which were included in Count V, conduct unbecoming an officer.

After failing to persuade Captain Rockwood to leave the prison yard, the military attache left to call for instructions. When he returned, he ordered Captain Rockwood to leave with him. Realizing that if he were forcibly arrested and removed from the prison, the junta would believe the U.S. had no intention of holding it accountable for prisoners, Captain Rockwood left.

An officer escort from the 10th Mountain Division was waiting at the Embassy and immediately took Captain Rockwood to the command post near the airport. There, in the presence of fifteen, or twenty officers and enlisted men, including his subordinates, Captain Rockwood was read his rights. It was about midnight.

Captain Rockwood was told in front of his unit that he would be sent for psychiatric exam and was escorted to the field medical unit about a hundred yards away. Major Inouye, a psychiatrist, after seeing Captain Rockwood, placed him in the minimal care ward and interviewed him twice. He found no evidence of any psychiatric problem, discharged him from medical custody and told Captain Rockwood in the morning to put on his uniform and wait for an escort from his unit.

Captain Rockwood, fearful for the lives of prisoners if there was not some follow-up to his accounting, tried to reach Colonel Bragg by phone, but was told the Colonel could not talk. Captain Rockwood later walked by his unit and asked to see Colonel Bragg without entering the restricted area. Colonel Bragg came to the entry area, demanded to know if Captain Rockwood left the medical unit without authority and repeatedly told Captain Rockwood to "shut up" when he tried to explain the plight and conditions of the prisoners. Colonel Bragg testified he did not want to talk to Captain Rockwood and never asked and never learned what Captain Rockwood saw at the prison. It was October 1. The next day Captain Rockwood was flown to Ft. Drum with an officer escort. The 10th Mountain Division did not act to secure the National Penitentiary until December 19, 1994.

Captain Rockwood proved to be tragically correct in his opinion of conditions at the National Penitentiary, and in his concern that his Division would fail to act in a timely fashion to protect the prisoners.

Three significant reports of conditions at the National Penitentiary were made before Captain Rockwood's trial in May 1995. A Colonel who was commander of a Military Police Brigade, not a part of the 10th Mountain Division, entered the

National Penitentiary unannounced on October 1 only hours after Captain Rockwood left. He was seeking a place to hold prisoners. He found conditions there did "not meet basic human needs". He sent General Meade a remarkable memo the next day urging, "The appalling conditions render this facility unsuitable for human habitation and this must be a priority..."

A report by the International Police Monitors which inspects prisons world wide dated February 1995 described the National Penitentiary as "the worst prison facility we have ever seen". One cell contained 412 prisoners with only one square meter per prisoner. It observed "Conditions were inhuman... The smell is unbelievable... Some prisoners had not been out of their cell for 15 days... sanitary facilities were unfit for human use."

In Congressional hearings, in late February 1995 which directly criticized General Meade, Congressman Dan Burton stated that an enlisted soldier in U.S. Army had urged him to visit the National Penitentiary in mid-February. He went there and found among other terrible things "...one cell where 500 prisoners had been housed for six months, standing in six inches of excrement. And that some their feet became gangrenous... and had to be amputated." In later hearings a week prior to trial before the House Committee on Foreign Affairs at which Captain Rockwood testified, Congressman Burton testified "... it just seems to me inconceivable that it took that long..." to secure the National Penitentiary. He continued, "Nobody has answered this question about Army Field Manual 41-10" which requires inspection of prisons to protect prisoners. Under Secretary of Defense Slocombe appearing at the same hearing, stated he had been to the National Penitentiary and "...it's appalling."

These reports generated a great deal of media attention and embarrassment for the 10th Mountain Division and General Meade because of the Army's failure to act. There was widespread reporting of Captain Rockwood's case in the media, most supportive of Captain Rockwood, with regular reporting on radio, TV and in the press in the Ft. Drum area which

highlighted the conflict between the 10th Mountain Division which failed to act and Captain Rockwood who acted. This was followed by the apparent reprisal by the Division in prosecuting Captain Rockwood and seeking lengthy imprisonment. Careers and reputations of Division commanders and Captain Rockwood were in direct conflict.

Efforts to minimize the danger to political prisoners and life threatening conditions in the prisons are unworthy of the Army and the Military Appeals courts. As an example of how a U.S. District Court described those conditions, see Coumou v. U.S., 1995 U.S.Dist. LEXIS 6665 (E.D.La. May 12, 1995).

General Meade was informed by Colonel Bragg that Captain Rockwood had gone to the National Penitentiary immediately after Colonel Bragg was informed. He knew of the decision to order Captain Rockwood from the prison before he was so ordered and that no effort to protect the prisoners was to be made. He knew of the decision to send Captain Rockwood for psychiatric examination and after he was found to have no psychiatric problems, to have him escorted back to Ft. Drum and placed under restrictions before these events occurred. His role in all these events is not known, because despite efforts beginning months before trial, General Meade was never compelled to testify though he was available at Ft. Drum, yards from the hearing room, during the pre trial and trial period.

Under these circumstances, General Meade was the commanding general who convened the court martial accusing Captain Rockwood. He designated the officers from among whom the trial court was chosen. He was the commanding officer of all the members of the court-martial and all the witnesses from the 10th Mountain Division who provided most of the testimony against Captain Rockwood. Members of the Court Martial and witnesses included General Meade's Chief of Staff, Inspector General, Judge Advocate, Chief Intelligence Officer, brigade commanders, executive officers and other senior officers, all of whom he knew personally, many of whom he saw frequently, even daily and for some of whom he was the

senior rater governing their promotions. One Major who was removed for cause during selection of the Court Martial testified he read in a newspaper that General Meade "was directly angry at... Captain Rockwood." Most of the officers must have assumed as much and shared the anger because of the embarrassment to the Division and effect on their careers.

The military judge refused to disqualify General Meade as the convening authority and accuser in the proceeding against Captain Rockwood. He refused to transfer the matter to another command for independent consideration. He refused to compel General Meade to testify either pre trial, or at trial.

The voir dire examination revealed deep seated prejudice against Captain Rockwood among the senior officers of the Division. Most of the twelve officers on the panel knew General Meade personally. Many worked closely with him. Six were excused for cause and one by the defense exercising its one peremptory challenge. There was little if any difference between the five senior officers who served and those dismissed. All the officers knew most of the other officers on the panel. Many were friends for many years. All expressed a reluctance to serve with an officer who committed the offenses with which Captain Rockwood was charged. The five who convicted voted for his dismissal from the Army. Most had heard opinions expressed about Captain Rockwood by seniors, peers and subordinates, family or friends. Nearly all opinions were negative even though, or perhaps because the media coverage was overwhelmingly favorable to Captain Rockwood.

His efforts to persuade Colonel Bragg to listen to his concerns about the prisoners and the conditions he found them in, was not a common case of insubordination, disrespect, or refusal to obey an order. It represented in microcosm Captain Rockwood's nearly week long effort to convince the Division officers that lives were endangered at the National Penitentiary and they had a duty to act. Colonel Bragg acknowledged that Captain Rockwood was sincere and a good officer, but he refused to hear what he had to say and never learned what he saw until the trial. And though it had been proven safe and was

clearly the right thing to do, like General Meade, he never considered completing the accounting of prisoners. The task could have been completed in a few hours and disappearances, deaths and injuries thereafter would have to be explained by prison personnel. The command was so rigid that two and a half months passed before its soldiers first entered the prison. It is not known how many prisoners in the National Penitentiary died, are unaccounted for, or suffered permanent injuries after U.S. forces occupied Haiti.

Captain Rockwood's defense to the charges against him was that his acts were justified and not unlawful because he was under a legal duty to act to save the lives of Haitian prisoners; as provided in RCM 916(c); that he acted under duress fearing that his failure to act would result in the deaths of Haitian prisoners, as defined in RCM 916(h); that under the common law doctrine of necessity his acts were lawful, because death, or serious injury to prisoners was imminent, he had exhausted alternative efforts to save the prisoners and his acts would have been effective if his command had not prohibited their completion and were no more than was necessary to provide accountability under the circumstances.

Captain Rockwood testified about his knowledge and belief concerning his legal duty to act and the circumstances under which he acted. He called three expert witnesses who testified at length concerning the laws of justification, duress and necessity as applied to hypothetical situations corresponding to the facts presented in this case. A single expert witness on military law, a Colonel from the Pentagon testified for the prosecution and visited and drank coffee with the court during recesses in the trial.

By virtue of his counter intelligence assignment, Captain Rockwood was the most informed officer in the Division concerning violence by the junta against Haitians and prison conditions. He believed, correctly that lives of prisoners at the National Penitentiary were in imminent danger. He also believed that the authorizing UN Security Council resolution, the command intention publicly announced by President Clinton,

the Operations Plan for the UN Joint Task Force and his Division, Army General Order 100, Army Field Manuals 22-10, 27-10 and 41-10, the case of In re Yamashita, 327 US 1 (1946), the Nuremburg Principles and international law cited in his complaint to the Inspector General imposed a duty on him to act to save Haitian lives, when his command failed to take such action. He chose the most effective, efficient, safe and successful means of accomplishing the protection of the prisoners.

The Military Judge refused to instruct the Court on the defense of justification expressing the view that international law on the subject was incomprehensible. He gave a lengthy confusing instruction on duress that included references to elements of a necessity defense, to international law, human rights law and U.S. law, but was itself incoherent, legally inadequate and failed to inform the Court whether any law imposed a duty, or an excuse for Captain Rockwood's acts.

After a week of proceedings, the court martial convicted Captain Rockwood on three of the five counts with which he was charged. He was found guilty of failing to go to his appointed place of duty on the evening he spent in the National Penitentiary, of leaving the medical unit without authority when he went to see Colonel Bragg, with disrespect to Colonel Bragg and willful disobedience of his order to shut up. He was acquitted of failing to obey a lawful order and dereliction of duty when he left the military base at the airport to proceed alone to the penitentiary and the most serious charge of conduct unbecoming an officer. His remaining sentence is dismissal from the Army, the equivalent of a dishonorable discharge.

The Army Court of Criminal Appeals affirmed the convictions and sentence on February 9, 1998. The United States Court of Appeals for the Armed Forces affirmed on September 30, 1999.

I. Captain Rockwood Was Charged, Tried and Convicted in General Court Martial Proceedings Within a U.S. Army Division Which Had a Clear Conflict of Interest and Denied Him a Fair and Impartial Trial

Captain Rockwood was charged by the commanding general of the 10th Mountain Division with multiple offenses, including conduct unbecoming an officer, for attempting to save lives of Haitian prisoners in the National Penitentiary. The Division had failed to act to save those persons and other Haitians, including a crowd assaulted in the immediate presence of a heavily armed battalion and international press which dramatically exposed the failure of the Division to prevent the assaults and death.

Captain Rockwood was tried by a panel of five senior officers in the Division most of whom served in Haiti and all of whom were aware of the widespread criticism of the Division for inaction and for filing charges against Captain Rockwood for attempting to save lives. Fact testimony against Captain Rockwood was given overwhelmingly by officers and enlisted men from the Division including the Division Chief of Staff, Staff Inspector General, Staff Judge Advocate, a Battalion Commander and others, who knew most of the Court members. One Court member served though it was known he would become deputy to the Staff Inspector General who was a hostile witness against Captain Rockwood.

Relationships were close and long among the five officers who served as the court and the officer witnesses, commanders in the Division, Colonel Bragg, Assistant Chief of Staff for Intelligence and General Meade. Colonel Bragg was Captain Rockwood's immediate superior and the complaining witness in the charges of disrespect and failure to obey the command ("shut up') of a superior commissioned officer. Some officers were classmates at West Point. Many had several previous tours together. Most were neighbors at Ft. Drum where their children were friends and classmates with each

other. The highest ranking officers , two on the court and three witnesses, were rated directly by Gen. Meade. Others were rated directly by the President of the court, a colonel. Their careers are determined in large part by their ratings. Most had direct frequent contact with General Meade. Some witnesses and court members had daily contact with General Meade in Haiti. One court member attended a small bible class with Lt. Col. Bragg. He was also a close neighbor and their families were friends. He acknowledged he could not give Lt. Col. Bragg's testimony "less weight" than other witnesses and would "have to make that conscious effort to weigh it equally." Concerning the adverse media coverage of the Division and General Meade, one prospective court member who was excused for cause candidly expressed what must have been the general feeling, "Just a shame... I shook my head and said, you know, 'It's just too bad.'" A Major reported reading a newspaper article that General Meade "was directly angry at... Cpt. Rockwood."

Of the twelve senior officers screened for service on the court martial, six were excused for cause. The prejudice was palpable. A seventh was removed by defendant's one peremptory challenge. The prosecution did not challenge a single prospective court member, or exercise its peremptory challenge.

The entire command and officer corps of the Division were personally challenged by Captain Rockwood's charges filed with the Inspector general and by his conduct. They were to be judged by his complaint to the Inspector General for failing to take action he then took. If there was any doubt as to whether the command felt itself challenged, it was removed by Charge V in which Captain Rockwood was cited for "Shouting and denouncing with derogatory language his chain of command and the President of the United States." Though he was acquitted of that part of Charge V, his conduct in aggressively urging the command to act to save lives at the National Penitentiary and upon its default, doing so by himself, spoke louder than words.

Captain Rockwood charged the command with

dereliction of duty in a life and death matter. He then acted to perform that duty. If Captain Rockwood's conduct was approved by the Army, then General Meade and the Division should have acted to protect the Haitian prisoners and Haitian human rights. The Command would concede its own failure if Captain Rockwood was not prosecuted, convicted and his character and mental stability questioned. General Meade was immediately informed when Colonel Bragg learned Captain Rockwood was at the National Penitentiary. He was personally present and directly involved in decisions made on how to handle the matter. Instead of proceeding to secure the penitentiary, then deal with Captain Rockwood as seemed proper, General Meade knew Captain Rockwood was to be arrested, charged in front of his staff, and escorted to the field hospital for psychiatric evaluation. General Meade may have made the decision to have a psychiatric evaluation and to return Captain Rockwood to Fort Drum with an escort of three senior officers.

General Meade was the convening authority for the Court and remained Division Commander throughout pretrial, trial and sentencing. A more direct and apparent conflict of interest is difficult to imagine. The commanding general and the members of the court-martial were judging themselves when they judged Captain Rockwood. Either the Captain was guilty, or they had failed to perform a duty on which lives depended. No reasonable person could fail to assume General Meade, most of the 10th Mountain Division officer corps, the Military Court and prosecution witnesses had personal feelings of interest in the outcome of Captain Rockwood's trial.

The defence moved before trial to disqualify General Meade as Convening Authority on grounds of conflict of interest and unlawful command influence. This relief was a crucial and indispensable step to achieve impartiality and fairness in a court martial proceedings against CPT Rockwood. The motion was denied.

Two days before he went alone to the National Penitentiary to save prisoners' lives, Captain Rockwood

received a copy of a report from a military unit not part of the 10th Mountain Division that it discovered a small prison in a place called Les Cayes where they found "horrific conditions" in which prisoners were dying, too weak to sit upright, whose flesh which was stuck to the floor tore off when they were lifted. It confirmed Captain Rockwood's reports of general prison conditions. Captain Rockwood took the Les Cayes report immediately to the commander of the operations center. When he heard Captain Rockwood describe the Les Cayes report he said "We dropped the ball." At that same time, Captain Rockwood provided the command with a list of five detention centers in Port au Prince and a notorious location where bodies of people summarily executed were dumped which required immediate action to protect Haitian lives.

The Les Cayes report received widespread media coverage evoking international outrage. It dramatically called attention to the urgent need to secure Haitian prison facilities to save lives.

Immediately before he proceeded to the National Penitentiary to list the names of prisoners held there, Captain Rockwood, finally became convinced that his efforts over five days to persuade the command to take action to save the prisoners had failed. He filed a formal complaint "against my command" with the Inspector General. In that complaint, Captain Rockwood noted that he had stated the National Penitentiary would be an immediate security concern for the mission on arrival in Haiti more than a month before the occupation. He named officers and offices in the Division to whom he had provided intelligence reports seeking action from whom he had failed to obtain action. His complaint directly challenged the command for its failure to do its duty and charged it with subverting its mission.

Attached to his complaint were copies of his daily intelligence summaries reporting Haitian against Haitian violence; a report he had requested a month before from the Pentagon on prison conditions in Haiti and had received only a day before his action which confirmed the international

reputation of Haitian prisons as atrocious; and the Les Cayes report. Neither his daily reports, or the Les Cayes report were produced at trial, the Army claiming it could not locate them.

The 10th Mountain Division was deeply embarrassed by the media reports and pictures showing that American troops watched as Haitian paramilitary police charged and beat Haitian crowds throughout the second day of the occupation. John Kifner of the New York Times began his page 1 story with "Club wielding Haitian police officers waded into throngs of people welcoming United States troops today, beating one to death as frustrated American soldiers looked on." Beneath the headline, "Haitian Police Crush Rally As American Troops Watch," was a large picture of a coconut vendor who had been clubbed to death in the foreground and a crowd in the background. The caption above the inside continuation of the story read, "Mission to Haiti: Allied With the Bullies?" Another picture showed a group of Haitian civilians with a badly beaten woman in the foreground, blood streaming down her face. See N.Y. Times, September 21, 1994, pp. A1, A15. Other media photos showed 10th Mountain Division soldiers watching as the assaults occurred and reported their anger.

One member of the Court Martial, a Major, who was the battalion executive of troops at the site of the beatings testified in voir dire before the trial that he was on duty at the scene not 20 meters distant when Haitian police repeatedly beat the crowd, killing the coconut peddler and injuring many others. He said it was shocking to watch, but the rules of engagement in effect at the time prohibited U.S. intervention. The Major testified the rules of engagement were changed within two days.

Asked whether he could follow a court instruction that, if disobedience to an order was necessary to save a life, disobedience might be justified, he answered "It involved disobedience of orders, sir?... That's a tough one." The Major was found qualified to serve on Captain Rockwood's court martial and voted to convict him, though it was clear that if Captain Rockwood was justified in acting to save life, the Major was guilty of failing to act to save life.

The Colonel who was Chief of Staff to General Meade in the 10th Mountain Division and for the Joint Task Force testified for the prosecution. He knew the Major who watched the assaults 20 meters distant. Though the Chief of Staff was not near the site of the incident the Major witnessed in which a crowd was beaten and a coconut peddler was killed, the Chief of Staff insisted under oath that the Army was not in the "vicinity to do anything about that" despite news coverage and vivid photos. He denied that the rules of engagement were changed after the incident. The Major sat on the court as his superior testified to things he knew from personal observation were not true.

Although the military and civilian justice systems are distinct from one another, see e.g. Chappell v. Wallace, 462 U.S. 296, 303 (1983), the requirements of due process of law under the Fifth Amendment are fully applicable to Captain Rockwood's court martial which was bound by the core due process concept of fundamental fairness and justice. See, Schad v. Arizona, 501 U.S. 624, 637 (1991); Dowling v. U.S., 493 U.S. 342, 352 (1990). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955).

Nothing in the special character of the military -- in such factors as the need for military discipline and obedience to orders -- and the intent of Congress as expressed in the exercise of Congress' constitutional power and authority over military forces, Art. I, §8, cls. 12-14, make the basic requirements of due process inapplicable in this case where there is a direct conflict of interest for the command and the court. To the contrary, the Uniform Code of Military Justice shows a deep concern based on a Congressional determination to protect defendants in court martial cases against harm from conflicts of interest on the part of commanders in referring charges, appointing members of the court and in the many ways they dominate the trial, sentence and subsequent review.

To guard against such conflicts of interest on the part of a commander, the UCMJ employs the concept of "accuser"

which it defines to mean:

> a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused. §801(9).

Several provisions disqualify an accuser from being a convening authority. See e.g. 10 U.S.C. §822(b); RCM 504(c)(1); see also 10 U.S.C. §837. Unlawful Influencing of Court.

These provisions for disqualification will be adequate in the ordinary case to protect a court martial defendant from conflicts of interest on the part of his commander. However, the conflicts of interest that beset this case and operated to Captain Rockwood's great prejudice were unique and extraordinary and transcended the paradigm which the UCMJ addresses. The intent to protect the court martial defendant from harmful conflicts should have been applied to the unique and powerful conflicts which this case presents. The conflicts are unique in several respects. Captain Rockwood's charge of misconduct against General Meade's command was correctly described by Judge Sullivan who concurred in the Court of Appeals for the Armed Forces as "a highly unusual event." A39. The complaint Captain Rockwood made to the Inspector General directly implicated not only General Meade. It also implicated members of the court and government witnesses directly and created conflicts for them that were not simply as derivative of the conflicting interests of their commander, or merely the ordinary familiarity unrelated to the merits of a case that officers of a command routinely have with one another, which is an accepted aspect of military law. These members of the court and government witnesses were themselves directly implicated as members of the 10th Mountain Division. Captain Rockwood's charges applied to them as individuals as well as members of the Joint Task Force in Haiti with the charge of failure to protect Haitians from violence and death, particularly the Major who stood by, considering himself to be immobilized by rules of engagement, while a Haitian was beaten to death --

a death which with a single order he could have had his troops prevent. These conflicts were powerful -- a charge of failure to perform a duty to save lives is very serious. The conflicts interacted and resonated throughout the court martial, sentencing and further proceedings. The inferable Congressional intent to protect against such conflicts of interest and the essentially judicial nature of the court martial and due process requirement of a fair trial readily distinguishes this case from cases in which constitutional protections afforded civilians have been held inapplicable in a military setting, see e.g. Parker v. Levy, 417 U.S. 733, 743-44 (1974)(an officer's speech that would be entitled to First Amendment protection if uttered by a civilian is punishable in a military context -- urging troops to refuse to obey orders sending them to Vietnam); see also, Rostker v. Goldberg, 453 U.S. 57, 67 (1981)(The tests and limitations of due process may differ in the civilian and military contexts).

The role played by General Meade in petitioner's court martial violated the basic due process rule that no person shall be judge in a case in the outcome of which he has interest, considered to be inherent in the concept of due process of law, see In re Murchinson, supra, 349 U.S. at 137, see also Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973). The fact that it was members of the court and not General Meade who rendered the actual verdict against CPT Rockwood does not avoid this due process violation because General Meade at crucial stages sat as both interested party and decision-maker. Cf. International Association of Machinists and Aerospace Workers v. Metro North Commuter Railroad, 24 F.3d 369, 371 (2d Cir. 1994).

The Court of Appeals in a brief paragraph, virtually without discussion, held that General Meade's disqualification as convening authority was unnecessary because he was not an accuser and did not have an interest other than an official interest in Captain Rockwood's prosecution. A9. Petitioner disagrees. The evidence unmistakably establishes him to be an accuser with much more than an official interest. The massive conflicts of interest in this case to which General Meade and

many others were directly subject, considered in the light of Congress' intent to protect court martial defendants from the unfairness attributable to such conflicts of interest, require that Captain Rockwood's conviction be set aside on due process grounds of fundamental unfairness.

No one aware of the relationships between the Commanding General, the officer corps and the witnesses with the officers on the Court Martial, with the failure of the Division to act to protect Haitian lives and Captain Rockwood's acts to save lives can believe this trial was fair, intended to be fair, or had any purpose other than retaliation to vindicate the conduct of the Division. That is a tragedy for truth, justice, the Army of the United States and the rule of law. Army officers, like other mortals, should not sit in judgment of their own case.

II. Petitioner's Fifth and Sixth Amendment Rights Were Violated by the Military Judge's Refusal to Require Production of General Meade as a Defense Witness

"In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor...." U.S. Const. Amend. VI. "[T]he defense counsel... shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." U.C.M.J. Art. 46. "The defendant has the right to present legally and logically relevant evidence at trial." U.S. v. Woolheater, 40 M.J. 170, 173 (C.M.A. 1994); and cases there cited including, Ake v. Oklahoma, 470 U.S. 68 (1985) and Chambers v. Mississippi, 410 U.S. 284 (1973). See also U.S. v. Scheffer, 523 U.S. 303 (1998).

The military judge's denial of production of General Meade as a witness requested by the defense violated CPT Rockwood's Fifth and Sixth Amendment rights as well as the provision Congress has made for compulsory process in the military justice system since 1863. "Few rights are more fundamental than that of an accused to present witnesses in his

own defense." Taylor v. Illinois, 484 U.S. 400, 408-09 (1988). The right to present a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967).

The military judge denied the defense's in limine motion for the production of General Meade as a trial witness, unsuccessfully renewed during trial, and its request to take General Meade's testimony by deposition before trial.

These rulings severely prejudiced petitioner's ability to establish for the military judge the grounds supporting petitioner's motion for General Meade's disqualification as convening authority. It also severely prejudiced petitioner's ability to establish for the members of the court martial key aspects of his defense, such as the unresponsiveness of General Meade to Haitian on Haitian violence and horrendous ongoing mistreatment of political and other prisoners in Haitian prisons and other factors like command intent which established the duty of Captain Rockwood to act to save the lives of Haitian prisoners.

Petitioner's defense was hampered by its inability to develop through General Meade's own testimony his actual personal interest. Such testimony taken together with the objectively undeniable appearance of such personal interest, would have compelled the conclusion he was an accuser under UCMJ 801(9) thus disqualifying him from acting as convening authority and achieving transfer of the proceedings to a Division without a conflict of interest. RCM 405(c)(1).

Judge Sullivan, concurring, viewed petitioner's inability to at least question General Meade about personal motives in referring charges against petitioner to court martial, as erroneous as a matter of law and a violation of due process. A39. Although Judge Sullivan ruled the error was harmless, this view is unsound. The error deprived petitioner of the valuable right to have his case considered and discretion exercised by a disinterested convening authority who on the unique facts of this case taking into account among other things petitioner's selfless motives and good faith belief he was under a legal duty to act, may well have decided against referral of charges.

The error was harmful in and of itself because General Meade's testimony would have supported Captain Rockwood's defense in many ways, and because it compounded the denial of due process arising from the many interlocking conflicts of interest that were operating to petitioner's great detriment.

III. The Military Judge's Failure to Instruct the Court Martial on the Military Defense of Justification, the Common Law Defense of Necessity and its Confusing and Incoherent Instruction on the Military Defense of Duress Violated Military Law, Federal Law and Due Process of Law Guaranteed by the Fifth Amendment Of the Constitution

An acquittal based on the defenses of justification, duress, or necessity would have been particularly damning for the command and senior officers of the 10th Mountain Division. If Captain Rockwood's acts were justified in law, then the Division's inaction would be unjustified in law. The Court Martial was judging itself when it judged Captain Rockwood.

Approximately one third of the trial involved testimony by Captain Rockwood, other military witnesses and expert witnesses addressing the defenses of justification, duress and necessity. Captain Rockwood had provided testimony that supported his conviction for failing to go to his place of duty the night he went to the penitentiary, of leaving the medical unit when he went to plead with Colonel Bragg to save the prisoners, and though he was acquitted, of failure to obey the order not to leave the military compound by the airport, except as authorized.

His only defenses were:

1. Justification, A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. RCM 916(c),
2. Duress, defined at RCM 916(h) but not designed for willful conduct undertaken to save the lives of others, from a belief it is a duty,

3. Common law necessity.

The Military Judge deprived Captain Rockwood of his defense. He refused to submit instructions on the defenses of justification and common law necessity. Indeed he failed entirely to instruct the court martial on whether Captain Rockwood had a legal duty to act to save prisoner's lives despite the hours of testimony concerning such a legal duty and argument of the issue to the court.

This left the court without legal guidance as to whether Captain Rockwood had a duty to act, much as Captain Rockwood was left without guidance from the command concerning action to save the prisoners.

Captain Rockwood was left to wrestle alone with the need for immediate action to save the lives of prisoners on the basis of his knowledge of the facts which was uniquely comprehensive and his insight into and awareness of international, U.S. and military law and command intent bearing on his duty to act. Knowing what he knew his duty to act was clear. The evidence which established Captain Rockwood's legal duty included the testimony of several experts and other witnesses who testified that his actions were a legal duty, compelled by international law, U.S. law and command intent.

Captain Rockwood had the benefit of some years of study of military duty and he repeatedly showed basic knowledge of FM 27-10 and other critical guides. When he asked the Judge Advocate's office for a copy of FM 27-10 soon after his arrival in Haiti, they were unable to locate a copy anywhere. He asked the Judge Advocate's office for guidance at least twice, first whether the Division was authorized to intervene in violence among non uniformed Haitians, and second whether it was authorized to inspect prisons. He was given affirmative legal opinions.

Retired Captain Hugh Thompson, awarded the Soldier's Medal for his action in stopping the My Lai massacre by threatening to use force against U.S. troops, testified he "would be surprised if superiors who failed to investigate [the prison] were not charged with... dereliction of duty." RT2148-50,

2159. He believed there was a duty to protect civilians, including the prisoners.

A law professor with both a law degree and a Ph.D. concentrated in international law and the law of war testified that among many other authorities, FM 27-10 was based on the Hague and Geneva Conventions, the Nuremberg Charter and World War II cases such as In re Yamashita, 327 U.S. 1 (1946). In his opinion there was a duty on U.S. forces in Haiti to go to the National Penitentiary and protect prisoners. He found support for his opinion in many other sources including Security Council Resolution 930, the speeches of President Clinton, the Lt. Calley case, and the Universal Declaration of Human Rights.

He testified that Captain Rockwood, under the circumstances of this case would be justified, under the law, in acting to account for the prisoners.

He stated Yamashita is not authority for the blanket proposition that there is no legal duty to act to save lives and prevent death on the part of soldiers who lack command responsibility. But that Yamashita powerfully suggests just the opposite and the Nuremberg principles require it.

In Yamashita, after finding that legal duties were imposed upon General Yamashita by the Annex to the Fourth Hague Convention of 1907, the Tenth Hague Convention and the Geneva Red Cross Convention of 1929 -- the very authorities cited and relied upon by Captain Rockwood and dismissively denigrated by the Army Court of Criminal Appeals as "a litany of human rights provisions," the Supreme Court observed that the affirmative duty international law imposed on a commanding officer such as Gen. Yamashita was also recognized and its breach penalized by U.S. military tribunals. Such a duty is reasonably extended to all soldiers with knowledge, responsibility and power to protect civilians.

A retired Navy Commander testified that the legal annex to the Operations Plan recognized that the Geneva Convention and laws of war for the protection of civilians were applicable to the operation, that under the Operations Plan an individual soldier with knowledge of a violation of the law of war would

have been under an obligation to report it to the SJA, and that if the chain of command doesn't listen and the individual gets desperate that something is going to happen, the individual "should do whatever [he] can to protect human lives regardless of the costs."

A retired Army Major testified that inspections of prisons by U.S. forces in foreign territory is necessary "to upgrade humanitarian conditions of those particular prisons because you're required, under international law and your own Army doctrine, to protect the civilian populous that you assume control of." He testified a timely survey of prisons in Haiti should have been a high priority and that a combined military intelligence and medical team should have gone into the penitentiary at Port-at-Prince in a very short time after the Division landed in that area. He cited authorities supporting his opinion, including Field Manual 41-10.

Captain Rockwood testified and explained forcefully and consistently, that he acted in order to fulfill a positive duty under U.S. and international law and in furtherance of the lawful order of the Commander-in-Chief, and a United Nations Resolution.

The Military Judge also refused to instruct the jury on the common law defense of necessity although it fit the circumstances of the case perfectly. Captain Rockwood violated orders requiring him to be at assigned posts, once to prepare his daily counter intelligence report on force protection and human rights violations, and later to remain in the medical unit until an escort arrived. He did so to save prisoners in imminent threat of death and serious injury. He had exhausted alternatives for saving the prisoners. He used the most effective, efficient and safe means of protecting the prisoners.

Instead of required instructions on justification and necessity, the Military Judge gave a long, confusing, hybrid instruction on what he called "Duress" after acknowledging that the evidence did not fit the defense. In the instruction he referred to such factors as international law, human rights law, humanitarian laws and laws of war for the protection of civilians, U.S. law, command policies and command intent, all

of which were the subject of extensive expert testimony, without providing any definition of such matters, or how they applied to Captain Rockwood's conduct and the verdict they were to make. The instruction was worthless as a guide for the Court and left the issue to its absolute discretion. The short excerpt from the instruction quoted in the opinions below is taken out of context. The entire instruction on duress is incomprehensible.

Both the duress and necessity defenses have deep roots in the common law, and as is true of military law generally, are affected by Congress's preference that military justice be consistent with "the principles of law... generally recognized in the trial of criminal cases in the United States district courts."

The defence of necessity fits the facts of this case perfectly, though military courts have not adopted it. The Court Martial should have been instructed on the defence of necessity, as well as instructed correctly on duress. There is ample evidence supporting each element of each defense.

The failure of the Military Judge to instruct the Court on the defenses of justification and necessity and its completely erroneous and inadequate instruction on what he called duress effectively deprived Captain Rockwood of his defense in violation of military law, federal law and due process of law. At a time of increasing peace keeping assignments for the U.S. military, such as Haiti, when the protection of human rights is the basic purpose of the mission, this is extremely harmful and dangerous to successful performance. Without a right to the defenses of justification, duress and necessity, the soldier in the U.S. military is confronted with a duty of absolute obedience to authority. The decision in this case deprives the U.S. Army of the type of officer it most needs to fulfill its mission in the new century.

Conclusion

The petition for writ of certiorari should be granted.

Dated: December 29, 1999

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee
v.
Lawrence P. ROCKWOOD, II, Captain U.S. ARMY, Appellant

No. 98-0488

52 M.J. 98; 1999 CAAF LEXIS 1269

September 30, 1999, Decided

PRIOR HISTORY: Crim. App. No. 9500872. Military Judge: R. D. Newberry.

DISPOSITION: Decision of the United States Army Court of Criminal Appeals affirmed.

CORE TERMS: military, prison, duress, multinational, court-martial, convening, commander, human rights, duty, prisoner, captain, intelligence, penitentiary, army, civilian, international law, disqualified, voir dire, counterintelligence, sentence, staff, operational, facto, task force, violence, mission, excused, attache, leader, conflict of interest

COUNSEL: For Appellant: Ramsey Clark (argued); Lawrence W. Schilling and Colonel John T. Phelps, II (on brief).

For Appellee: Captain Arthur J. Coulter (argued): Colonel Russell S. Estey, Lieutenant Colonel Eugene R. Milhizer, and Major Patricia A. Ham (on brief).

Amicus Curiae: James J. Gibson and Billy B. Ruhling, II (Law Students) (argued); Frederic Lederer (Supervising Attorney),

Ian R. Iverson, Patrick J. McGuire, and Paul D. Ziegler (Law Students) (on brief) - For the William and Mary School of Law.

JUDGES: COX, C.J., delivered the opinion of the Court, in which CRAWFORD, GIERKE, and EFFRON, JJ., joined. GIERKE, J., filed a concurring opinion. SULLIVAN, J., filed an opinion concurring in part and in the result.

OPINION BY: COX

OPINION: Chief Judge COX delivered the opinion of the Court.

The charges in the instant case arose on September 30 and October 1, 1994, in Haiti, during the initial days of the American-led, multinational operation designated as Operation Uphold Democracy. The granted issues concern appellant's contentions that he was denied a fair trial due to command influence and conflict of interest "affecting virtually the entire command"; that the military judge improperly denied production of several defense-requested witnesses; that all of the court members were disqualified; that the evidence of appellant's guilt was insufficient to sustain the convictions; and that the military judge's instructions regarding the defenses of justification, necessity, and duress were erroneous.[1]

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[1] As framed by appellant, the granted issues are:

I WHETHER CAPTAIN ROCKWOOD WAS DENIED A FAIR AND IMPARTIAL TRIAL AS A RESULT OF INTERRELATED UNLAWFUL COMMAND INFLUENCE AND CONFLICTS OF INTEREST AFFECTING VIRTUALLY THE ENTIRE COMMAND, INCLUDING THE COURT AND PANEL MEMBERS AND PROSECUTION WITNESSES.

The Court of Criminal Appeals summarized the circumstances leading to the charges in this case as follows:

On 31 July 1994, the United Nations (U.N.) Security Council determined that the situation in Haiti was a threat to the peace

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II WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING PRODUCTION OF MAJOR GENERAL MEADE, BRIGADIER GENERAL HILL, OTHER WITNESS TESTIMONY AND EVIDENCE RELEVANT AND NECESSARY TO ESTABLISH CAPTAIN ROCKWOOD'S DEFENSES.

III WHETHER INDIVIDUAL MEMBERS OF THE MILITARY COURT WHO WERE DISQUALIFIED FROM SERVICE ON THE COURT WERE ERRONEOUSLY PERMITTED TO SERVE DESPITE BEING CHALLENGED FOR CAUSE.

IV WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT CAPTAIN ROCKWOOD WAS GUILTY OF CHARGES I, II, AND III.

V WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL ON THE DEFENSES OF JUSTIFICATION AND NECESSITY AND BY GIVING A DURESS INSTRUCTION THAT WAS INCORRECT AND CONFUSING.

The appeal was heard on February 26, 1999, at the College of William and Mary School of Law, Williamsburg, Virginia, as a part of the Court's "Project Outreach" program. See *34 M.J. 194, 195 n.1 (CMA 1992)*. Under the supervision of Professor Fredric Lederer and with the consent of appellant, law student amici filed a brief in the case and orally argued several issues.

and security of the region. Acting under Chapter VII of the Charter of the United Nations, the Security Council authorized U.N. Member States to form a multinational task force (MNF) "to use all necessary means to facilitate the departure from Haiti of the military leadership, . . . the prompt return of the legitimately elected President [President Aristide] and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment . . . ." United Nations Security Council Resolution 940, U.N. SCOR, 3413 mtg. (1994) [hereinafter U.N.S.C. Res. 940].

On 19 September 1994, with a MNF invasion of Haiti imminent, a team led by former President Carter negotiated an agreement with the ruling military government in Haiti which permitted the peaceful entry into Haiti of a MNF to accomplish the aims of U.N.S.C. Res. 940. Elements of the 10th Mountain Division immediately began deploying into Haiti on 19 September 1994 as part of Joint Task Force (JTF) 190. The Haitian military government was to remain in place until the agreed return of President Aristide's government on 15 October 1994.

Appellant was a counter intelligence officer with the 10th Mountain Division's Office of the Assistant Chief of Staff for Intelligence (G2). He deployed to Haiti on 23 September 1994. Appellant was personally concerned about intelligence reports which reflected deplorable conditions at the National Penitentiary in Port au Prince. He attempted to initiate a JTF inspection of the National Penitentiary by raising the issue with his superiors on the joint intelligence staff, a captain in the staff judge advocate's office, and the division chaplain. Appellant considered the JTF's inaction toward the National Penitentiary to be contrary to President Clinton's intent [i/] and a violation of the JTF's obligation under international law to protect human rights.

On 29 September 1994, a grenade attack near the Haitian

Presidential Palace killed several Aristide supporters and injured many others. As a result of this attack, Major General (MG) Meade (the 10th Mountain Division commander and the general court-martial convening authority who referred these charges to trial) increased operational and counter intelligence efforts to identify the attackers and to safeguard American forces.

Appellant disagreed with the decision to increase operational security instead of immediately inspecting the National Penitentiary. On the morning of 30 September 1994, he filed a formal complaint with the 10th Mountain Division Inspector General (IG) requesting that the IG "inform the commanding general as soon as possible of facts that may lend the appearance that the JTF is indifferent to probable ongoing human rights violation[s] in PAP [Port au Prince, or National] Penitentiary." Appellant's complaint explained his concerns: "Per the intent of the U.N. resolution and the primary 'cause ad bellum' [that] our President addressed to the Nation for our [] military presence, indifference to ongoing human rights violation[s] in our direct proximity appears to me to be a subversion of that intent."

Later that day, appellant decided, without command authorization, to "inspect" the National Penitentiary. Appellant did not go to his appointed place of duty when his shift began that evening because he had gone to the prison without authority. Later, after appellant's return from the prison, Lieutenant Colonel (LTC) Bragg [ii/] ordered appellant admitted to the local combat support hospital for psychiatric evaluation. [iii/] Appellant left the hospital without permission, contrary to an order from the psychiatrist evaluating him, to tell LTC Bragg what he saw at the prison. During this discussion, appellant repeatedly and disrespectfully yelled at LTC Bragg and disobeyed orders to be "at ease" and to "be quiet."

* * *

[i/] Appellant watched President Clinton's televised address to the nation on 15 September 1994. He recalled the President stating that one of the reasons for U.S. involvement in Haiti was "to stop the brutal atrocities" that were occurring in Haiti.

Appellant did not recall seeing a televised news conference on 19 September 1994, at which President Clinton said, "My first concern, and the most important one, obviously, is for the safety and security of our troops. General Shalikashvili and Lieutenant General Hugh Shelton, our commander in Haiti, have made it clear to all involved that the protection of American lives is our first order of business."

[ii/] Lieutenant Colonel Bragg served as the Assistant Chief of Staff for Intelligence (G2) for the 10th Mountain Division, the Director of Intelligence for JTF 190, and the Assistant Chief of Staff for Intelligence (J2) for the multinational forces. Appellant worked for LTC Bragg.

[iii/] Appellant's actions caused LTC Bragg to have concerns about appellant's mental health. Prior to going to the prison, appellant, a Tibetan Buddhist, left a note on his bunk quoting Buddhist sacred text about making "a gift of my body." The note continued, "I have done what is legal to stop something that is plainly illegal. Now you coward[s] can court-martial my dead body." Appellant's note concluded that the "action required" was "all means necessary to implement the intent of the UN and U.S. President[']s intent on Human Rights. Take this flag, it is soiled with unnecessary blood." Appellant fastened a U.S. flag patch (normally worn on the battle dress uniform to identify U.S. forces) in an upside down position to his note with a safety pin. He subsequently "inspected" the National Penitentiary with a loaded M-16 rifle. The Haitian prison officials summoned the military attache from the U.S. Embassy for assistance in disarming appellant. The attache ultimately persuaded appellant to unload his weapon and leave the prison.

48 M.J. 501, 503-04 (1998).

In view of appellant's conduct, as well as the fast-evolving situation on the ground and the initial evaluation of appellant at the combat support hospital (including appellant's revelation to the psychiatrist that he had been taking Prozac, an

antidepressant, which had been prescribed by a civilian doctor, without the knowledge of military authorities), the decision was made to evacuate appellant from Haiti immediately.

For his conduct in Haiti, appellant was offered nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), *10 USC § 815*, along with the opportunity to resign, which he refused. Subsequently, court-martial charges were preferred and referred to a general court-martial.

Appellant was charged with a series of offenses under the UCMJ arising out of his conduct on the evening of September 30 and during the following day, October 1. The charges of which he was convicted included: (1) failing to go to his prescribed place of duty at the Joint Task Force headquarters at the time he was required to report for duty, 2000 hours on September 30, in violation of Article 86, UCMJ, *10 USC § 886;* (2) engaging in conduct unbecoming an officer on September 30, in violation of Article 133, UCMJ, *10 USC § 933*, by leaving the headquarters area in a manner that intentionally avoided detection, jumping over the fence surrounding the headquarters, traveling to and demanding entry at the National Penitentiary to make an inspection that he was not authorized to conduct, thereby endangering himself, the classified information he possessed as a counterintelligence officer, and a fellow military officer who came to the Penitentiary in light of appellant's activities; (3) unlawfully departing the combat support hospital, which had become his appointed place of duty on October 1 pending evacuation from the country, in violation of Article 86; (4) disrespect towards his superior commissioned officer, LTC Bragg, in violation of Article 89, UCMJ, *10 USC § 889;* and (5) willful disobedience of repeated commands from LTC Bragg to lower his voice, "be at ease," and "stop talking," in violation of Article 90, UCMJ, *10 USC § 890.*

The court-martial, comprised of officer members, found appellant not guilty of two specifications under Article 92,

UCMJ, *10 USC § 892,* for failure to obey certain orders and dereliction of duty, and found him not guilty of portions of the charge under Article 133 involving certain of his actions at the National Penitentiary. The court-martial sentenced appellant to a dismissal and total forfeitures.

The convening authority disapproved the entire finding of guilty of conduct unbecoming an officer. Accordingly, he dismissed that Charge and its specification. In all other respects, however, he approved the findings. Regarding the sentence, the convening authority reduced the forfeitures to $1,500 pay per month for 2 months, but he approved the dismissal. The Court of Criminal Appeals affirmed the approved findings and sentence. *48 M.J. at 513.*

Particular facts relevant to each issue are incorporated within the discussion of the issue itself.

In the first issue, appellant alleges unlawful command influence and conflict of interest affecting the convening authority, most of the command structure, the court-martial and its panel members, and the prosecution witnesses. The allegations are an extension of those made in appellant's motion in limine at trial to disqualify the convening authority and dismiss the charges. As at trial, appellant points to no specific evidence of disqualifying influences or interests. Rather, the essence of his argument is that, because he made accusations against the command and intentionally violated its orders, and because he has continued to criticize the conduct of Operation Uphold Democracy through various media and human rights organizations, the entire command was put in the position of defending its own conduct at the court-martial. Accordingly, in appellant's view, nobody in this command could have anything to do with the processing of his case or the judging of his conduct because the "command would lose face" unless appellant was convicted. Thus, appellant contends that the convening authority and court members were "judging themselves when they judged" appellant. Final Brief at 29. We reject this thesis.

Article 37, UCMJ, *10 USC § 837*, prohibits a convening authority or anyone else from unlawfully influencing the action of a court-martial. Further, a convening authority is disqualified if he is an "accuser" or has "an interest other than an official interest in the prosecution of the accused." Art. 1(9), UCMJ, *10 USC § 801*(9); RCM 504(c)(1), Manual for Courts-Martial, United States (1994 ed.). Bare allegations of unlawful command influence "in the air," however, are not sufficient to raise the issue. *United States v. Allen, 33 M.J. 209, 212 (CMA 1991)*, cert. denied, *503 U.S. 936, 117 L. Ed. 2d 617, 112 S. Ct. 1473 (1992)*. Nothing in the instant case suggests that the convening authority here had anything other than an official interest in the case or that he in any way sought improperly to influence the outcome of this court-martial.

Military judges are disqualified if their "impartiality might reasonably be questioned," if they have "personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts," or if they have acted in the case in various other disqualifying capacities. RCM 902(a) and (b)(1). Nothing in the instant case suggests that the military judge here was disqualified.

Court members are subjected to examination by the parties, challenge for cause, and peremptory challenge. RCM 912(d), (f), & (g); *United States v. Modesto, 43 M.J. 315, 318 (1995)*. For the reasons indicated in Section III, infra, we are satisfied that the court members here were free from command influence, bias, conflict of interest, or other disqualifying features.

Witnesses are subjected to the "crucible of cross-examination" to test their assertions for accuracy, bias, conflict of interest, or other reasons to discount or disbelieve their testimony. *United States v. LeMere, 22 M.J. 61, 69 (CMA 1986)*. The defense fully exercised its prerogatives in this area and vindicated this important principle. Thus, if any of the witnesses were biased, that bias was exposed through cross-examination.

On this record, appellant has not demonstrated that the convening authority of the 10th Mountain Division, or anyone within the organization that acted in appellant's case, should have been disqualified from proceeding or acting on appellant's case. Appellant's personal conviction that the convening authority must have felt humiliated or threatened by appellant's criticism is not sufficient to demonstrate that appellant's trial was infected by unlawful command influence or conflict of interest.

Public criticism of military operations--including withering critiques of strategy, tactics, personnel policies, and human rights concerns--is inherent in a democracy. Congress, through the enactment of Article 138, UCMJ, *10 USC § 938*, and the laws governing the Inspector General function, *5 USC App. 3*, has established specific means of directing criticism within the armed forces. Given the significant domestic and international consequences of military operations, there will be few military leaders or organizations who escape such criticisms. If a servicemember were permitted to disqualify convening authorities, panel members, and witnesses simply by leveling or reciting critiques of military operations, it is unlikely that any command could conduct a court-martial involving offenses pertaining to military activities. We do not believe that Congress, in recognizing the critical role of military justice in maintaining good order and discipline, intended to preclude commanders from utilizing that system in an operational setting. The traditional tools of discovery, voir dire, challenges, and cross-examination provide a means of identifying improper influences or interests on the part of commanders, court-members, or witnesses. In the present case, appellant has not demonstrated that any such influences affected the fundamental fairness of his court-martial.

II

The second issue involves appellant's in limine motion to produce as witnesses Major General (MG) Meade, the initial

commander of the joint task force (and the convening authority in appellant's case), and Brigadier General (BG) Hill.

Regarding MG Meade, civilian defense counsel explained that the defense wanted to talk to General Meade about his understanding of what the U.N. resolution required, what President Clinton's instruction required as to command intent, what international law imposed upon him as a general officer to do in connection with human rights. How any order that sought to prohibit protection of human rights can be harmonized with international law and U.S. law, and what if anything he did at any time to protect human rights during the period.

In a written proffer designated as "expected testimony, "the defense added that MG Meade will further testify about what, if any, emphasis he placed on dealing with reports of human rights violations when issuing the mission statement and commander's intent related to operations in Haiti, particularly in what way he responded to the Commander-in-Chief's directives concerning human rights issues. He will also testify as to whether he declared that force protection was a higher priority than "stopping brutal atrocities in Haiti."

It is not represented that the defense had ever spoken to or tried to speak to MG Meade, or that they knew what he might say about these matters.

Based on the proffers, the military judge could not discern in limine the relevance of MG Meade's "expected" testimony, though he acknowledged that "it's possible that his involvement with these matters is relevant, but I can't say that based on what I know now." Accordingly, the military judge denied the motion to order production of the convening authority as a witness at that time, but he specifically invited the defense to make the request again after the Government's case was presented or at any appropriate time during the defense case. At the same time, the judge instructed the Government to know the whereabouts of the convening authority during the course of the trial so that he could be brought back quickly, if necessary. Appellant does

not claim that the defense ever renewed its request for MG Meade, nor have we come across such a request in our review.

BG Hill, also requested as a witness by the defense, was sought for his alleged knowledge of the improved prison conditions in Haiti in January 1995, months after appellant's evacuation from Haiti. BG Hill was assistant division commander of the 25th Infantry Division, which succeeded the 10th Mountain Division as the command element of the task force. The military judge declined to order production of BG Hill on the grounds that his knowledge was "absolutely too remote, and so it's not relevant."

The Uniform Code of Military Justice grants all parties "equal opportunity to obtain witnesses . . . in accordance with such regulations as the President may prescribe." Art. 46, UCMJ, *10 USC § 846.* The President, in turn, has provided that "each party is entitled to the production of any witness whose testimony on a matter in issue . . . would be relevant and necessary." RCM 703(b)(1); see Mil. R. Evid. 401. We review judges' decisions on witness production for abuse of discretion. *United States v. Miller, 47 M.J. 352, 359 (1997); United States v. Ruth, 46 M.J. 1, 3 (1997).*

As to BG Hill, we are satisfied the military judge did not abuse his discretion in determining that BG Hill's proposed testimony was not relevant and denying his production as a witness.

In hindsight, it appears that the request for MG Meade was meant to be connected with subsequent defense trial assertions that: (1) atrocities were being committed at the National Penitentiary on and immediately preceding September 30, 1994; and (2) by September 30, the American-led force could readily have spared the assets to prevent these atrocities; but (3) as a result of incompetence, culpable indifference, or worse, the American command was unconcerned about Haitian-on-Haitian human rights violations.

Even in retrospect, MG Meade's state of mind regarding his personal understanding of international law and the balance he sought to strike between force protection and suppressing violence have little to do with whether the conditions on the ground justified appellant's conduct under international law. Whatever marginal relevance MG Meade's state of mind might have had, we cannot fault the military judge for lacking clairvoyance in limine. Moreover, the requirement of RCM 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects. We hold that the military judge did not abuse his discretion in refusing to order the convening authority's production at that time. Moreover, in failing to renew and clarify its request for MG Meade, as they were specifically invited to do, the defense failed to preserve the issue.

III

The next issue pertains to appellant's challenge for cause of the members who sat in his case. Of the twelve members detailed to the court-martial, the military judge excused one member without objection, he dismissed five members based on defense challenges for cause, and an additional member was excused as a result of the defense's peremptory challenge. The defense also challenged the remaining five members for cause, but the military judge denied those challenges. The issue before us pertains to the correctness of the military judge's decision not to strike the remaining five members.

The issue was fully and satisfactorily treated by the Court of *Criminal Appeals, 48 M.J. at 510-12,* and we have only a few observations to add to that discussion. Essentially, the trial judge permitted extensive and broad voir dire of the prospective members, consuming well over 500 pages of record of trial. All of the members were challenged on a wide range of bases, including their various degrees of contact with prospective witnesses and other court members, their knowledge of

conditions on the ground in Haiti as a result of having been there, and their exposure to pretrial publicity.

The defense also challenged many members for having inflexible attitudes on sentencing. During voir dire, the military judge had permitted civilian defense counsel the latitude of questioning the prospective members about the sentences they were likely to adjudge.

For example, counsel was allowed to ask each of the members the following sort of question: Assume you find appellant guilty of all the charged offenses (i.e., that he, without justification or excuse on the 11th and 12th day after the multinational force's landing in Haiti,[2] was twice absent without leave from his appointed place of duty, that he disobeyed several orders, that he was disrespectful to a superior commissioned officer, that he was derelict in his duty, and that his conduct was unbecoming that of an officer), is there nevertheless a place in the Army for appellant?

Many of the members expressed reservations, upon which counsel argued that they held inelastic attitudes on sentencing. In *United States v. Reynolds, 23 M.J. 292, 294 (CMA 1987)*, we stated that "neither the Government nor the accused is entitled to a commitment from the triers of fact about what [sentence they would ultimately impose]." See also *United States v. Small, 21 M.J. 218, 219 (CMA 1986)*. Moreover, in *United States v. Ohrt, 28 M.J. 301 (CMA 1989)*, and *United States v. Horner, 22 M.J. 294 (CMA 1986)*, we saw through the commonly employed euphemisms for punitive discharge.

There is no issue before us, however, concerning the propriety of the defense questions, as the military judge permitted the

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[2] Appellant arrived in Haiti several days after the initial wave, on September 23. He began work on September 24 and "inspected" the penitentiary on September 30. He had previously managed just one trip into town.

inquiry. We are satisfied in any event that, viewing the voir dire of each prospective member as a whole, the military judge was well within his discretion in accepting those that he did. *United States v. Dinatale, 44 M.J. 325, 327 (1996).*

The parties are "entitled to members who will keep an open mind and decide the case based on evidence presented in court and the law as announced by the military judge." *Reynolds, 23 M.J. at 294.* Members are not per se disqualified from serving if they have "distaste for particular offenses," *United States v. Daulton, 45 M.J. 212, 217 (1996),* "innocuous prior knowledge of the facts of a case," *United States v. Lake, 36 M.J. 317, 324 (CMA 1993),* or a "professional relationship" with government witnesses, *United States v. Rome, 47 M.J. 467, 469 (1998).* None of the information extracted from court members who sat in appellant's case disqualified them automatically.

Furthermore, it is quite clear that the military judge was basing his rulings on his personal assessment of each member. Thus, in dismissing one member, MAJ H, over trial counsel's protestations, the military judge responded:

Major [H] is excused. While there might be some validity to some of the points that you've [trial counsel] raised, judging his demeanor about the inelastic attitude toward dismissal, he did not convince me that he did not have an inelastic attitude. In other words, I think his statements about dismissal I could not necessarily believe. . . .

In contrast, accurately characterizing the gist of MAJ R's voir dire responses (one of the members not struck), the military judge ruled:

At the beginning of his questioning, he [MAJ R] said he could follow the judge's instruction; he could consider zero to maximum. And you have to take a look at whatever the evidence was. At the end he said if the accused was found guilty of all of these offenses, he probably should be removed from the Army.

It would be difficult for him to conjure up in his imagination the facts that would allow him to keep the accused in the Army. But he certainly said it was within the possibility of happening. What we want here are people who can consider the evidence, and then decide an appropriate punishment. Obviously if the accused stands convicted of all these offenses, it probably would be very difficult for some of these court members to not vote for a dismissal. But the bottom line is he said that he would not imply any automatic punishment. And I don't think we can ask for anything more from this particular court member. He said he could consider it. The weight to be given to it is a different matter. He can consider it. He wouldn't automatically vote for a dismissal, and the challenge is denied.

Recently, in *United States v. Giles, 48 M.J. 60, 61 (1998)*, we concluded that a military judge abused his discretion when he declined to grant a challenge for cause of a member who persistently indicated that he was "necessarily set on a bad-conduct discharge," even though he agreed to consider all the evidence. Where, however, the totality of the circumstances indicate, as here, that a member is genuinely open to considering all mitigating and extenuating factors which are relevant to a just sentence before arriving at a fixed conclusion, a military judge has broad discretion to grant or deny challenges. *United States v. White, 36 M.J. 284, 287 (CMA 1993)*, cert. denied, *510 U.S. 1090 (1994)*. Giving the military judge the deference due him on account of his superior position to observe the demeanor of the court members, we agree that he did not abuse his discretion in declining to strike the remaining members.

IV

In the fourth issue, appellant challenges the sufficiency of evidence of the offenses of which he stands convicted. Being a court without fact-finding authority, Art. 67(c), UCMJ, *10 USC § 867*(c), our standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).*

There is no question but that the Government's evidence met the standard of legal sufficiency. Appellant himself, through his testimony, established that, rather than going to his appointed place of duty, he went "over a perimeter wall, an area that would attract the least attention." He then proceeded downtown to the National Penitentiary, where he was ultimately placed under control by a fellow Army officer who was the embassy attache. Numerous other witnesses testified to appellant's absence from his place of duty that night, the discovery that he was at the penitentiary, and his recovery therefrom. In addition, numerous witnesses testified to the boundaries imposed on him as a patient at the field hospital, his transgression of those boundaries, his accosting LTC Bragg, and his disobedience of and disrespect to LTC Bragg. The evidence of the offenses of which appellant stands convicted is legally sufficient.

V

The final issue involves the defense theses of "justification," "duress," and "necessity." As to justification, the defense argued at trial that the military had failed in its duty to protect human rights under the norms of international law by failing to secure the National Penitentiary. Appellant himself tended to portray the U.S. forces in general, and the multinational force command and staff in particular, as a "renegade division," that was "indifferent" to human rights or life, and "criminally negligent" because it failed to inspect immediately and rectify the conditions at the National Penitentiary of Haiti.

In contrast, appellant viewed his own course of conduct as justified or excused under general international law, the Hague and Geneva Conventions, the United Nations and Nuremberg Charters, and the President's "intent" as announced in a televised speech. Appellant testified that he alone was following these dictates, and that he believed it was necessary to enter the prison because he believed that the prisoners faced torture, murder, and

other human rights violations. Thus, the defense wanted instructions to the effect that appellant should be exonerated if the foregoing matters were established.

It is important to place these matters in context. The United Nations Security Council authorized a multinational force to "facilitate the departure from Haiti of the military leadership" and the "prompt return of the legitimately elected" government. Pursuant to that authorization, and utilizing the threat of imminent military invasion, representatives of the United States reached an agreement with the de facto government of Haiti in which the de facto military government was to remain in place until a time well after the point at which appellant took matters into his own hands.

Indeed, as of September 30, according to the embassy attache who recovered appellant from the penitentiary, the de facto government was still in "control of the security apparatus," and the multinational force was obliged to continue working with the "outlaws" for a few more weeks. Appellant himself acknowledged that "cooperation" with the de facto regime was required. He knew that the "troika" comprising the de facto government was still in country, that "we were trying to get them to leave the country with as minimal force as possible," and that it was "the national policy" to work with them for the time being.[3]

The difference between a military organization and a mob is the role of command and control in channeling, directing, and

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[3] One member of the troika outranked MG Meade, the multinational force commander. Therefore, as appellant volunteered: General Shelton "was being kept in the area because we did not--we wanted to show respect to Lieutenant General Cedras, and didn't want to make him lower himself to address [Major] General Meade who was one rank lower."

restraining human behavior. A modern army is made up of soldiers possessing a variety of skills, and it operates corporately. Some soldiers carry rifles, others use artillery, others drive tanks, and others fly helicopters. There are mechanics, engineers, radio and computer operators, medics, military police, cooks, clerks, ordinance and supply personnel, truck drivers, and many other types of specialists. The only way the mission can be performed is if all elements perform their functions in accordance with the guidance and restrictions imposed by the command. Communication of intelligence up and down the chain of command and between elements is vital. The overall missions and objectives are established by the civilian governmental supervisory structure and are implemented down the chain of command.

The harsh reality of command responsibility is that military leaders constantly face difficult choices in meeting the competing demands of operational goals and force protection, while at the same time addressing a host of related issues concerning the environment, innocent civilians, and collateral damage resulting from the use of force. It is the commander, not the subordinate, who must assess these competing concerns and develop command priorities. Given the destructive weaponry that our nation entrusts to our military leaders, there is no other way to control and direct the awesome power that is vested in the armed forces.

The decision to place primary emphasis on force protection at the outset of the operation is the type of decision that is within the responsibility of the commander. Every officer and enlisted person under that command has a duty to perform in support of the commander's priorities, and is guided in that duty by orders that both direct and restrict that servicemember's scope of action. Whether in the chaos of large-scale combat or in the delicate conduct of peacekeeping and peace enforcement, a servicemember must obey a commander's decision as to the priority given to force protection, as opposed to protection of the civilian population.

The undisputed record demonstrates that appellant's role in the mission at the time was force protection, and that he knew it. He was a company grade staff officer assigned to the counterintelligence section at the multinational force headquarters.[4] His job was to analyze information regarding threats to the joint task force and to pass it up through command channels, where operations were planned and directed. Neither appellant nor anyone within his section was involved in intelligence collection, and they had no operational authority whatever. Other elements of the multinational force were involved in spreading out across Haiti projecting power, suppressing Haitian-on-Haitian violence, and facilitating the governmental transfer. As always, force protection was a critical component of the overall operation.[5]

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[4] Though appellant had approximately 15 years of military experience at the time of his court-martial, in April and May 1995, much of his time had been spent as an enlisted medic and health counselor. Haiti was his first "large operation" deployment

[5] One of appellant's subordinate noncommissioned officers, Sergeant First Class David L. Hooper, made this point when, explaining how appellant was becoming obsessed with matters outside his function, he testified:

As a matter of fact, what--after the second day of reviewing or publishing the reports that Captain Rockwood had done--done the final edit on, I realized he was becoming emotionally involved. His focus was now more and more on, you know, that Multinational Forces were not doing their job, which is not our assessment. That's not our job to publish in our intel summary that we're not doing our job. I noticed more and more of this--we've got to do more for humanitarian rights. I understood what he was saying, but again, that particular publication is not the venue for that particular information. So what I did was I sat down one day and I said, sir, I know you're a very strong and

The record demonstrates, moreover, that at the time of the charged offenses, the situation on the ground was dynamic. To appellant's knowledge, there had already been a firefight on September 24 at a location removed from Port-au-Prince, and there was credible evidence of threats against the multinational force by various groups and individuals.[6] These hostile groups and individuals apparently believed that American public and political support for the operation was thin, and that the infliction of even a small number of casualties on U.S. forces might provoke enough dissonance at home to cause the operation to be aborted.[7] These threats included potential

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emotional, professional officer, you know, and I'm your NCOIC, and you know, I support your right to feel what you feel, to think what you think, but I go, sir, we've got to recall what our actions are and what our actions can affect out there as part of the total operation. Maybe you need to think about, you know, if necessary I'll help you, you know, re-review and we'll get reoriented to a more--a more clearly intelligence product rather than an inflammatory product. (Emphasis added.)

[6] Appellant regarded these "threats to U.S. forces . . [as] insignificant [compared] to the threats that faced the Haitian population that we were there to protect." Shortly after appellant's evacuation from Haiti, an American soldier was shot and critically injured, and still later another American servicemember was shot and killed.

[7] Appellant's testimony indicates that he was well aware of this concern:

Matter of fact, as I was leaving the hanger at Griffiss Air Force Base to go on the 747 to go to Portau-Prince, there was a very heated argument between, I think the leader of the Senate and the leader of the minority about whether or

grenade, mortar, and machine gun attacks on Americans, and they were taken very seriously by the task force command.[8] In this connection, identifying weapons caches was also a critical part of the counterintelligence mission.

Further, the counterintelligence function supported the mission of safely restoring the legitimate Haitian government. The hand grenade tossed into the crowd commemorating the ouster of President Aristide and celebrating his imminent return--in close proximity to American forces on the day before appellant's excursion--underscored the need to detect and stop the bad actors. Larger rallies were expected the next day--the day appellant commenced the charged conduct--as appellant himself acknowledged.

He also acknowledged that, as a result of the grenade attack, the operational tempo "more than picked up. I think it changed the focus of the entire operation." When asked if the operational tempo was "fast paced and hectic" at the time, he replied, "That's obvious."

At the same time, the American-led force was in the midst of trying to contain and dissipate a class-based civil war. Various thug elements loyal to the de facto government roamed the streets at night seeking out their victims, and oppressed slum-dwellers swarmed the upper class neighborhoods, the police, and

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not Haitians--Haitian democracy was worth one American life. So I was aware that there was--this was a very highly charged political issue in the United States, whether or not democracy was worth one American life.

[8] The record reflects that appellant was not with the 10th Mountain Division in Somalia the year before, when a deceptively friendly initial reception quickly turned hostile and deadly.

shops by day.[9]

As might be expected in a multinational operation sanctioned by the United Nations, the American-led force was not some kind of government unto itself, with power to arrogate whatever role it wanted. Indeed, regarding prisons, according to the embassy attache, the overall prison issue was an issue that was put before the whole inter-agency process in the U.S. Government. The primary responsibility fell to USAID [U.S. Agency for International Development] and the Department of Justice to help the Haitians move ahead in terms of improving prison conditions.

In addition, the attache explained, a group of international police monitors was established as part of the multinational force "to work with the interim public security force--the Haitian security forces--to monitor their--their activities and help stand up an interim police force." The security forces were the ones who were guarding the prisoners.[10]

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[9] At trial, appellant repeatedly criticized what he characterized as the command's excessive emphasis on force protection and its indifference to Haitian suffering. When asked on cross-examination if the command was being "indifferent" to Haitian violence "when it tried to prevent violence during the demonstrations on the 29th and 30th [of September]," appellant retorted:

You mean along the approaches to Petionville? The massive use of deadly force against pro-Aristide demonstrations, that they approached the residences of the elite in Petionville? Is that what you're addressing?

[10] Appellant did know that, "under doctrine," the Civil Military Affairs Center was "required to monitor the Haitian government infrastructure and that would include the prisons that were under the control of the Haitian military police . . . ." He was not aware that other agencies

As it happens, the commander of the multinational force's military police contingent in the Port-au-Prince area, Colonel (COL) Michael L. Sullivan, also visited the National Penitentiary on October 1, 1994, at about 9:00 a.m., 8 to 10 hours after appellant was removed from the facility. Testifying as a defense witness, COL Sullivan stated that he had not heard about appellant's visit at the time; he was there on business of his own. As the multinational forces had begun taking prisoners, COL Sullivan was looking for appropriate places to house them.

Arriving without notice, he was received cordially and was, upon his request, immediately given a complete tour of the facility. He described the building as a large structure that was in total disrepair. Paint--what the areas that could be called painted as in many of the other places on Port-au-Prince, there was little evidence of any care of the building, little evidence of any care of the structure. It was filthy. Conditions inside the prison were terrible.

* * *

If you're comparing it with something in the United States, you really can't. If you're comparing it with other third [world] countries, it was probably at the low end. If you're comparing it with other facilities in Port-au-Prince, it's probably below average, but not by much.

COL Sullivan compared the prisoners with "the people outside the prison," noting that they "didn't look much different . . . . The whole country is poor," he observed, adding that, "the whole country is in horrible condition, which is why we went in the first place." This latter observation was echoed by many

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and institutions beyond the military had roles in assisting in justice and prison matters. Ultimately, it appears, the armed forces component of the multinational force did a great deal of the heavy lifting in cleaning up the prisons. That does not mean, however, that the military command had the authority to take over functions of the de facto government on whatever timetable and to whatever degree it chose.

other witnesses.[11]

As he toured the facility, COL Sullivan saw "no signs of physical torture or abuse," albeit "there were a group of men in the infirmary that looked very ill." Had he "seen conditions . . . that were immediately life-threatening," the Colonel testified, he "would have taken action, as we had done on the streets of Port-au-Prince." He did not, however, see immediate, life-threatening conditions.

COL Sullivan queried the prison officials about their budget and learned that "there was no money, no resources put into those government--government facilities," which was consistent with what he "experienced in the police stations." As a result of his visit to the prison, COL Sullivan submitted that very day a report to the joint task force commander, MG Meade, recommending that "the United Nations or some--some relief organization be directed to visit the prison and provide some relief for the conditions." COL Sullivan decided not to house his prisoners there.

Appellant's description of the penitentiary is qualitatively similar to COL Sullivan's. Like COL Sullivan, appellant was received "courteously." Appellant, however, arrived in the early evening, about 7:00-7:30 p.m., when it was already starting to

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[11] One witness described "the human misery everywhere in Haiti. . . . One young boy having to urinate on his hands to clean them" because "there was no running water." According to another witness: "The conditions in Haiti were horrendous. I mean, they were absolutely horrendous. The kids, malnutrition, they were bad. I mean, they were--I have never seen anything that bad in my life. They were extremely bad. I mean, I remember vividly kids, parents, people, eating out of a garbage dump, digging through garbage. A particular stream that ran--I went by--you know, they were urinating in that, bathing in it. I remember that vividly. That will always stay with me."

get dark. He was not able to tour the entire prison, and only saw a fraction of the prisoners. He described several crowded cells of what he deduced to be "military prisoners" because "they appeared in very good shape. . . . They seemed almost to have athletic physiques." Those in the "infirmary," however, "seemed very emaciated, very skeletal," and there were "a number of amputees."

Appellant was surprised that "it seemed very open at night for a prison. They seemed to keep the door open." Three or four women, who appellant guessed were maids, "came in and out of the prison." "They were washing clothes. There's a fountain there," appellant testified. As appellant stood in the darkened courtyard of the prison for "about 3 hours," he saw no one in the prison towers, and he "could not see how this facility could keep anyone in if they got out of a cell, because there were steps going up the walls . . . ."[12] Like COL Sullivan, appellant reported no torture or physical abuse, and none of the prisoners complained to him.

Before analyzing the legal doctrines pertaining to appellant's conduct, it is necessary to review what the record reflects he actually knew of the current situation in the National Penitentiary.

Appellant testified that, while still at Fort Drum, as plans were being made for the operation, he concluded that "simple common sense would tell you that a prison would be the--the key location to be concerned about [for Haitian-on-Haitian violence] on entry and a change of government on entry of a foreign force into a country." In Haiti, "a common sense, logical conclusion" nourished his belief that people were "going to die" at the National Penitentiary. In his trial testimony, he cited

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[12] Indeed there was evidence that about 2 weeks later, on October 13, 117 people escaped from the National Penitentiary, and that was not an isolated incident.

repeatedly, but never quantified, "open source and other reports" on "Haitian-on-Haitian violence in the prisons." He also repeatedly invoked "history."[13] He maintained that he "was aware that . . . [the National Penitentiary] has one of the worst conditions in the world," that he had "foundational knowledge that there was [sic] human rights violations," and that he "had no, not one bit of information that it was anything otherwise." He conceded, however, that he "had no spot--counterintelligence spot reports on the Haitian Penitentiary."

On the evening of 27-28 September, a report about a jail in Les Cayes (a city some distance from Port-au-Prince) was widely circulated following its discovery by U.S. military personnel inspecting a co-located police station for weapons. The condition of that facility and its prisoners was reportedly "horrendous" and "shocking." Appellant projected that, "if those same conditions exist in Port-au-Prince," the multinational force "could be liable under international law . . . ." (Emphasis added.)

On the 29th of September, appellant received a classified report on prisons in Haiti, one that he had requested while still at Fort Drum in late August. Essentially, the report lists the number of people known or believed to be incarcerated at various facilities around the country on various specified dates. In addition, a narrative section provides very general and historical background information pertaining to the overall system. Appellant's take on the report was that, although it was a "general report," it "corroborated the information . . . [he]

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[13] At one point, he stated, "As [a] student of history I've never heard of an oppressive or dictatorial regime that doesn't have political prisoners. I don't know if one has existed in history. If Haiti was that condition [sic], it would be the first in history, I think." At another point, he stated, "And I had history from the last 45 years. I know it doesn't have 'Secret' on top and the bottom, but, believe it or not, some things are valid without that caveat."

received from . . . [his] counterintelligence sources," and it gave him "every reason to expect the conditions of Les Cayes in Port-au-Prince." No other evidence of the conditions at the National Penitentiary, or appellant's foreknowledge of them, was adduced at trial.

One observation is essential at this point. Whatever information, of whatever reliability, appellant may have had about the inner-workings of the Haitian prison and politico-justice systems over the last 45 years, up to and including the oppressive reign immediately preceding the U.N.-authorized intervention, he could not point to any information about the current conditions, operations, or practices at the penitentiary.

Yet at trial, appellant maintained that the charged conduct concerning his visit to the prison was based on the rules of engagement in effect during the operation in Haiti. In particular, he cited rule 7, which states, in pertinent part:

PERSONS OBSERVED COMMITTING SERIOUS CRIMINAL ACTS WILL BE DETAINED USING MINIMAL FORCE NECESSARY . . . .

When appellant slipped over the wall of the multinational force compound in the late afternoon of September 30, 1994, it is clear that he had observed or been apprised of no criminal acts at the National Penitentiary.[14]

Justification

Under the formulation of the Manual for Courts-Martial, "justification" is denominated a defense for a "death, injury, or other act caused or done in the proper performance of a legal duty." RCM 916(c); cf. 1 Wayne R. LaFave and Austin W.

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[14] Or at any of the other four facilities in the Port-au-Prince area he wanted inspected.

Scott, Jr., SUBSTANTIVE CRIMINAL LAW 641-43 (1986).[15]

Appellant cites us to no legal authority--international or domestic, military or civil--that suggests he had a "duty" to abandon his post in counterintelligence and strike out on his own to "inspect" the penitentiary. Neither does he suggest any provision of any treaty, charter, or resolution as authority for the proposition. Further, he does not here claim that he received personal orders via television from the Commander-in-Chief. Moreover, he cites no authority for the proposition that his observations at the penitentiary supplied him with a duty that permitted him to be disrespectful to LTC Bragg, to disobey his orders to be at ease, or to depart from the field hospital where he was being detained. In this circumstance, we conclude that the military judge did not err in declining to provide a justification instruction.

Duress and Necessity

Duress and necessity are very closely related defenses. 1 LaFave and Scott, supra at 631; Rollin M. Perkins and Ronald N. Boyce, CRIMINAL LAW 1065 (3d ed. 1982). Classically, duress was seen as a defense to crime if the defendant was

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[15] "Justification" was not traditionally a separate defense in Anglo-American jurisprudence, but rather denoted a category or class of defenses that included "necessity," "self-defense," and "public duty." See Art. 3, ALI MODEL PENAL CODE, reprinted in ALI MODEL PENAL CODE AND COMMENTARIES (Part I) 1-5 (1985); Chapter 5, 1 Wayne R. LaFave and Austin W. Scott, Jr., SUBSTANTIVE CRIMINAL LAW (1986). Where the defense of "duress" applies, the actor is not considered justified for the conduct, but excused. Rollin M. Perkins and Ronald N. Boyce, CRIMINAL LAW 1059 (3d ed. 1982). See also *United States v. Bailey, 444 U.S. 394, 409-10, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980).*

compelled or coerced to commit the crime by some human agency, under a threat of serious imminent harm to the defendant or others. Thus: Assist in this bank robbery or I will kill you (or another person). Being charged with bank robbery, the defendant interposes duress as a defense. See LaFave and Scott, supra at 614-27; Perkins and Boyce, supra at 1059-65; see also *United States v. Vasquez, 48 M.J. 426, 429-30 (1998).*

For the defense of duress to apply, the crime committed must have been of lesser magnitude than the harm threatened, and "the duress must [have] consisted of threatening conduct which produced in the defendant (1) a reasonable fear of (2) immediate (or imminent) (3) death or serious bodily harm." LaFave and Scott, supra at 615, 618 (emphasis added, footnote omitted). An "obviously safe avenue of escape before committing the prohibited act" nullifies the defense. Perkins and Boyce, supra at 1060.

The defense of necessity, in contrast, was traditionally seen as a "choice of evils" defense. Here the "pressure of circumstances" [16] was not brought by human agency, but by the situation itself. LaFave and Scott, supra at 629. Thus: It was necessary for me to trespass across the private property in order to rescue the person who was drowning in the adjacent lake. Charged with trespass, the defendant pleads necessity. Id. at 627-31. The defendant's belief that his actions were necessary must have been reasonable, and there must have been no alternative that would have caused lesser harm. Id. at 635, 638; *United States v. Bailey, 444 U.S. 394, 410, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980).* Put another way, "the issue is whether the duress or necessity was such that a reasonable person, under like circumstances, would have been impelled to do what was done by the defendant." Perkins and Boyce, supra at 1069.

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[16] Perkins and Boyce, supra at 1065, call necessity: "NECESSITY (DURESS OF CIRCUMSTANCES)."

As LaFave and Scott note, however, "modern cases have tended to blur the distinction between duress and necessity." Id. at 628, quoting *United States v. Bailey, supra.*

The Manual formulates a defense of "coercion or duress" as follows:

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. . . . If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

RCM 916(h) (emphasis added).

There is no Manual provision specifically denominated "necessity," nor is there a standard military instruction under that heading. According to one commentator, necessity has never been directly recognized in the military, possibly owning to a concern that "private moral codes will be substituted for legislative determinations, resulting in a necessity exception that swallows the rule of law."[17]

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[17] Eugene R. Milhizer, Necessity and the Military Justice System: A Proposed Special Defense, *121 MIL. L. REV. 95, 96-97 (1988).* To the extent Milhizer is referring to situations not involving the flouting of military authority, he surely goes too far. There is, for example, no reason why the drowning situation would not provide a defense. However, "It was necessary for me to leave my post or disobey your lawful order in order to perform some more important function" could be another matter, one which the

Be that as it may, the military judge decided to provide what was functionally a necessity instruction. The judge recognized that the standard duress instruction did not fit the circumstances, in that there was no coercion by human agency in the classic sense. That is, no one put a gun to appellant's head and said, "Inspect the prisons or somebody dies." So the judge tried to "blend" the duress instruction to fit the circumstances, including the elements of necessity.

Thus, he instructed the members:

Now I'd like to talk to you about what we're going to call "duress." It's a defense. And the evidence has raised the issue of duress in relation to all of the charges that have been charged against Captain Rockwood.

Duress is a complete defense to each offense to which it applies, which is all of them. In evaluating this defense, keep in mind that you must apply the defense to each offense separately. To be a defense, Captain Rockwood's participation in the offense must have been caused by a well-grounded apprehension that a prisoner in, or prisoners in, the National Penitentiary would immediately die or would immediately suffer serious bodily harm if Captain Rockwood did not commit the charged act.

The amount of compulsion, coercion or force must have been sufficient to have caused an officer who was faced with the same situation and who was of normal strength and courage, to act. The fear which caused Captain Rockwood to commit the offense must have been fear of death or serious bodily injury and not

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instant facts do not require us to resolve. See *United States v. Olinger, 50 M.J. 365, 366-67 (1999).*

simply fear of injury to reputation or property, or to bodily injury less severe than serious bodily harm. The threat and resulting fear must have continued throughout the commission of the offense.

(Emphasis added.) Specifically absent from this instruction was any limitation that the coercion or reasonable apprehension be caused by human agency.

At trial, appellant objected to the officer "of normal strength and courage" phrase. On appeal, he contends he was entitled to a duress instruction sans this language. We agree with the military judge that classic duress was not raised, and thus this point is moot. Even if duress were raised, the complained-of language merely expresses an objective standard, which is unquestionably a component of both duress and necessity. LaFave and Scott, supra at 618-19, 635; Perkins and Boyce, supra at 1061, 1069; RCM 916(h).

Regarding necessity, appellant contends that the military judge erred by failing to give such an instruction. In our view, a necessity instruction was in fact given, and the military judge formulated the instruction in a manner that comported well with general civilian criminal law. The inclusion of elements of objectivity and compulsion of circumstance in the instruction was not a flaw. See LaFave and Scott, supra at 629, 635, 638; Perkins and Boyce, supra at 1069; Bailey, supra at 410.

There may indeed be unusual situations in which an assigned military duty is so mundane, and the threat of death or grievous bodily harm to civilians is so clearly defined and immediate, that consideration might be given to a duress or necessity defense. However, in view of the form of the instruction here incorporating the concept of necessity, that question is moot.

* * *

When the American military police colonel with nearly 30 years of service stands in the bowels of the Haitian National

Penitentiary and pronounces it "filthy . . . terrible," we have no occasion to disbelieve him. Indeed, we assume that prison conditions in much of the world would be shocking to our sensibilities. This was not, however, a general inquest into Haitian prison conditions; nor was it a broad-based investigation into the overall conduct of Operation Uphold Democracy. As to those matters, we make no attempt to pass judgment.

Rather, this was an inquiry into appellant's conduct, and in the course of it, questions were raised as to whether his actions were justified or excused under the circumstances then prevailing. Appellant was assigned important intelligence responsibilities, and the record supports the conclusion that he did not possess information demonstrating a clearly defined and immediate threat of death or grievous bodily harm to innocent civilians. Under the circumstances, the court members' rejection of appellant's defenses was rational. Cf. *Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); United States v. Turner, 25 M.J. 324 (CMA 1987).*

The decision of the United States Army Court of Criminal Appeals is affirmed.

CONCUR BY: GIERKE; SULLIVAN (In Part)

CONCUR: GIERKE, Judge (concurring):

I agree completely with the majority opinion. I write separately to set out in greater detail my reasons for upholding the military judge's ruling on the challenge of MAJ R.

In my view, the military judge should not have allowed the defense to ask questions on voir dire that asked for a sentencing commitment from court members based solely on the nature of the offenses. See *United States v. McLaren, 38 M.J. 112, 118 (CMA 1993)* (recognizing that responses to "artful" questions and inaccurate responses do not require that a challenge for

cause be granted). Thus, it is not surprising that the court members' responses required clarification.

This Court has long recognized that "an unfavorable inclination toward an offense is not automatically disqualifying." *United States v. Giles, 48 M.J. 60, 63 (1998)*, quoting *United States v. Bannwarth, 36 M.J. 265, 268 (CMA 1993)*, and citing *United States v. Reynolds, 23 M.J. 292, 294 (CMA 1987)*, and *United States v. Cosgrove, 1 M.J. 199 (CMA 1975)*. "The test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." McLaren, supra, quoting *United States v. McGowan, 7 M.J. 205, 206 (CMA 1979)*.

In this case, the defense voir dire included the following:

Q. Shall we start again?

A. [MAJ R] Well, your question is, if he was found guilty on all charges should he stay in the Army?

Q. Yeah--I mean, you read these five specifications, or whatever they are called--pretty lengthy stuff--now, knowing that and he is convicted of them, do you want somebody in the Army like that? Do you think there is a place in the Army for people who do those things?

A. Well, if he is found guilty, I would say no.

Q. So, in your opinion he shouldn't be in the Army?

A. If he is guilty--if he is found guilty.

Q. And then, if he--you'd consider everything, but basically, your opinion, if he is convicted, he ought to be removed from the Army?

A. That's correct.

The military judge recognized what the defense was doing. He first explained that the court-martial was "not an administrative elimination board." He explained that "a dismissal for an officer is like a dishonorable discharge for an enlisted person," and that "it's a very severe punishment, you could never erase the effects of it." He discovered upon questioning MAJ R that he did not understand that the adjudication of guilt was separate from the determination of a sentence. The military judge then asked the following clarifying questions:

Q. Well--but, there is guilty or not guilty, and then there is mitigating and extenuating circumstances. What I'm saying is, is that based upon the mere fact that he is guilty, you would feel compelled to vote for a dismissal, regardless of any of the other evidence?

A. Well, no, I guess I need--when you said that there is mitigating or other--I guess, I would need to hear that first, that would come out in the trial.

Q. So, you could envision that there might be some mitigating or extenuating circumstances that wouldn't warrant a dismissal--a punitive separation?

A. Can I envision any? No, but I might hear some.

Q. All right. Could you consider everything from zero punishment to the maximum, whatever that is?

A. Yes, sir, I've done that before when I've given Article 15's and other nonjudicial--but, I guess, if you're asking at face value, without hearing any of the other things--could I weigh it between the two? I would weigh it.

Q. But it would be hard for you to envision any extenuating or

mitigating circumstances so extreme as to allow you to keep the accused in the service?

A. That's correct.

Trial counsel then asked the following questions:

Q. Major [R], if we could just touch on this issue just a little bit more, with respect to any punishment, do you feel that there is any automatic punishment that you must give to the accused, if you found him guilty of anything?

A. No.

Q. Do you believe that you would be able to consider evidence in the sentencing phase of the trial, that would allow you to determine whether or not a dismissal was appropriate? For example, do you believe there might be evidence, although you might not be able to imagine in your mind right now--

A. Okay, I understand what you're--yeah, I think that if I heard something that I'm not aware of right now, that, yes, I could take that into consideration.

Q. You just can't think of anything because you don't know the facts of the case?

A. At the--that's correct.

Q. Okay. So, if you heard it--you would wait to determine whether or not to assess a dismissal or any other type of punishment?

A. That's correct.

Q. Until you've heard the evidence?

A. [Affirmative response]

Q. So, do I understand you to say, you don't feel compelled to do that?

A. No, I wouldn't be compelled to do that.

Q. Just because of the charges?

A. That's correct.

We recognize that a military judge has a "superior position in evaluating the demeanor of court members." Thus, we grant a military judge "great deference" and we "will not reverse a ruling on a challenge for cause absent a clear abuse of discretion." United States v. McClaren, supra. I agree with the majority that the military judge did not abuse his discretion.

Finally, I agree with the majority that this case is distinguishable for our recent decision in *United States v. Giles, supra.* In Giles, the court member in question was adamant. He agreed to listen to the evidence before deciding on a sentence, but said that he was "necessarily set on a bad-conduct discharge." *48 M.J. at 61.* In this case, once the military judge cleared up the confusion, the member unqualifiedly stated that he would reserve judgment on whether to vote for a dismissal until he heard all the evidence.

SULLIVAN, Judge (concurring in part and in the result):

I concur in the result on parts I and II of the majority opinion. In my view, Major General Meade should have been produced for the limited purpose of establishing whether he

referred charges against Captain Rockwood for personal rather than official reasons. See generally Art. 46, Uniform Code of Military Justice, *10 USC § 846*, and RCM 703(b)(1) Manual for Courts-Martial, United States (1994 ed.). Nevertheless, I would not reverse appellant's conviction.

Before Captain Rockwood went to the prison in Haiti, he lodged an official Inspector General's (IG) complaint against numerous members of Major General Meade's staff for not protecting political prisoners. Once Major General Meade's command was charged by Captain Rockwood with misconduct (a highly unusual event), a reasonable person might conclude that the General may have had a personal interest in punishing Captain Rockwood, i.e., retaliation for embarrassing his command. Since Rockwood had been charged for misconduct after he had filed the IG complaint, Rockwood should have been able to at least question Major General Meade about any personal motives on his part in referring these criminal charges to court-martial. See Arts. 1(9) and 22(b), UCMJ, *10 USC §§ 801*(9) and 822(b). As Justice Frankfurter said in *Caritativo v. California, 357 U.S. 549, 558, 2 L. Ed. 2d 1531, 78 S. Ct. 1263 (1958):*

Audi alteram partem--hear the other side!--a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, . . . whenever any individual, however lowly and unfortunate, asserts a legal claim.

However, notwithstanding the error made by the trial judge in not ordering a possible accuser under Article 22(a) to be questioned about his motives in referring charges against Captain Rockwood, I would hold this error harmless. See *United States v. Jeter, 35 M.J. 442, 446-47 (CMA 1992)* (holding defect in referral by accuser not jurisdictional). In my view, any reasonable Division commander, given the actions

of appellant as reported to Major General Meade, would have brought these charges against him. See *Whren v. United States, 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)* (if probable cause existed to stop a person for a traffic violation, actual motivation of officer for stop is irrelevant).

Accordingly, I join the majority in affirming this case.

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee
v.
Captain LAWRENCE P. ROCKWOOD II, United States Army, Appellant, ARMY 9500872

48 M.J. 501; 1998 CCA LEXIS 68

February 9, 1998, Decided

PRIOR HISTORY: 10th Mountain Division (Light Infantry) and Fort Drum. R. D. Newberry, Military Judge.

CORE TERMS: military, legal duty, commander, duty, international law, soldier, duress, prison, voir dire, court-martial, pretrial publicity, staff, servicemember, convening, human rights, intelligence, bias, port, operational, legality, matter of law, sentence, domestic, conflicts of interest, inspect, defense of necessity, affirmative defense, political question, mental health, threshold

COUNSEL: For Appellant: Ramsey Clark, Esq. (argued); Lawrence W. Schilling, Esq.; Captain Eric S. Krauss, JA (on original brief); Ramsey Clark, Esq.; Lawrence W. Schilling, Esq.; Captain John M. Head, JA (on supplemental brief); Colonel John T. Phelps II, JA; Captain Jodi E. Terwilliger-Stacey, JA.

For Appellee: Captain John M. Bergen, JA (argued); Lieutenant Colonel Eva M. Novak, JA; Major Virginia G. Beakes, JA (on brief); Colonel Joseph E. Ross, JA.

JUDGES: Before COOKE, TOOMEY, and CARTER, Appellate Military Judges. Chief Judge COOKE and Senior

Judge TOOMEY concur.

OPINION BY: CARTER

OPINION: OPINION OF THE COURT

CARTER, Judge:

A general court-martial composed of officers convicted the appellant, contrary to his pleas, of failure to go to his appointed place of duty, leaving his appointed place of duty, disrespect to a superior commissioned officer, willfully disobeying a superior commissioned officer, and conduct unbecoming an officer in violation of Articles 86, 89, 90, and 133, Uniform Code of Military Justice, *10 U.S.C. §§ 886*, 889, 890, and 933 (1988) [hereinafter UCMJ].[1] The court-martial adjudged a sentence of dismissal and forfeiture of all pay and allowances. The successor convening authority[2] disapproved the finding of guilty of conduct unbecoming an officer, approved the remaining findings of guilty, and approved a sentence to forfeiture of $1500.00 pay per month for two months and a dismissal. This case is before the court for automatic review under Article 66, UCMJ.

Appellant raises six assignments of error, all of which we decide against him.

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[1] The members found the appellant not guilty of failure to obey an order and dereliction of duty in violation of Article 92, UCMJ, as well as significant portions of the conduct unbecoming an officer specification.

[2] The 10th Mountain Division changed commanders after referral of the charges but prior to action.

I. CPT ROCKWOOD WAS DENIED A FAIR AND IMPARTIAL TRIAL AS A RESULT OF INTERRELATED UNLAWFUL COMMAND INFLUENCE AND CONFLICTS OF INTEREST AFFECTING VIRTUALLY THE ENTIRE COMMAND, INCLUDING THE COURT AND PANEL MEMBERS AND PROSECUTION WITNESSES.

II. INDIVIDUAL MEMBERS OF THE MILITARY COURT WERE DISQUALIFIED FROM SERVICE ON THE COURT.

III. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT CPT ROCKWOOD WAS GUILTY OF CHARGES I, II, OR III [all of the approved charges].

IV. THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL ON THE JUSTIFICATION DEFENSE, THE APPLICABILITY OF COMMAND INTENT AND INTERNATIONAL LAW TO THE ACTS ALLEGED AND ERRONEOUSLY INSTRUCTED THE PANEL ON DURESS.

V. THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING PRODUCTION OF MAJOR GENERAL MEADE, BRIGADIER GENERAL HILL, MR. MICHAEL LEVY, OTHER WITNESS TESTIMONY AND EVIDENCE RELEVANT AND NECESSARY TO ESTABLISH CAPTAIN ROCKWOOD'S DEFENSES.

VI. THE SENTENCE OF DISMISSAL IS ERROR.

The events underlying the charges in this case occurred in Haiti during the initial stages of Operation Uphold Democracy. There is no substantial question about what appellant did. The principal issue is whether he had a legal justification or excuse for his actions.

On 31 July 1994, the United Nations (U.N.) Security Council determined that the situation in Haiti was a threat to the peace and security of the region. Acting under Chapter VII of the Charter of the United Nations, the Security Council authorized U.N. Member States to form a multinational task force (MNF) "to use all necessary means to facilitate the departure from Haiti of the military leadership, . . . the prompt return of the legitimately elected President [President Aristide] and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment. . . ." United Nations Security Council Resolution 940, U.N. SCOR, 3413 mtg. (1994) [hereinafter U.N. S.C. Res. 940].

On 19 September 1994, with a MNF invasion of Haiti imminent, a team led by former President Carter negotiated an agreement with the ruling military government in Haiti which permitted the peaceful entry into Haiti of a MNF to accomplish the aims of U.N. S.C. Res. 940. Elements of the 10th Mountain Division immediately began deploying into Haiti on 19 September 1994 as part of Joint Task Force (JTF) 190. The Haitian military government was to remain in place until the agreed return of President Aristide's government on 15 October 1994.

Appellant was a counter intelligence officer with the 10th Mountain Division's Office of the Assistant Chief of Staff for Intelligence (G2). He deployed to Haiti on 23 September 1994. Appellant was personally concerned about intelligence reports which reflected deplorable conditions at the National Penitentiary in Port au Prince. He attempted to initiate a JTF inspection of the National Penitentiary by raising the issue with his superiors on the joint intelligence staff, a captain in the staff judge advocate's office, and the division chaplain. Appellant considered the JTF's inaction toward the National Penitentiary

to be contrary to President Clinton's intent[3] and a violation of the JTF's obligation under international law to protect human rights.

On 29 September 1994, a grenade attack near the Haitian Presidential Palace killed several Aristide supporters and injured many others. As a result of this attack, Major General (MG) Meade (the 10th Mountain Division commander and the general court-martial convening authority who referred these charges to trial) increased operational and counter intelligence efforts to identify the attackers and to safeguard American forces.

Appellant disagreed with the decision to increase operational security instead of immediately inspecting the National Penitentiary. On the morning of 30 September 1994, he filed a formal complaint with the 10th Mountain Division Inspector General (IG) requesting that the IG "inform the commanding general as soon as possible of facts that may lend the appearance that the JTF is indifferent to probable ongoing human rights violations in PAP [Port au Prince, or National] Penitentiary." Appellant's complaint explained his concerns: "Per the intent of the U.N. resolution and the primary 'cause ad

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[3] Appellant watched President Clinton's televised address to the nation on 15 September 1994. He recalled the President stating that one of the reasons for U.S. involvement in Haiti was "to stop the brutal atrocities" that were occurring in Haiti. Appellant did not recall seeing a televised news conference on 19 September 1994, at which President Clinton said, "My first concern, and the most important one, obviously, is for the safety and security of our troops. General Shalikashvili and Lieutenant General Hugh Shelton, our commander in Haiti, have made it clear to all involved that the protection of American lives is our first order of business."

bellum' [that] our President addressed to the Nation for our [ ] military presence, indifference to ongoing human rights violations in our direct proximity appears to me to be a subversion of that intent."

Later that day, appellant decided, without command authorization, to "inspect" the National Penitentiary. Appellant did not go to his appointed place of duty when his shift began that evening because he had gone to the prison without authority. Later, after appellant's return from the prison, Lieutenant Colonel (LTC) Bragg[4] ordered appellant admitted to the local combat support hospital for psychiatric evaluation.[5]

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[4] Lieutenant Colonel Bragg served as the Assistant Chief of Staff for Intelligence (G2) for the 10th Mountain Division, the Director of Intelligence for JTF 190, and the Assistant Chief of Staff for Intelligence (J2) for the multinational forces. Appellant worked for LTC Bragg.

[5] Appellant's actions caused LTC Bragg to have concerns about appellant's mental health. Prior to going to the prison, appellant, a Tibetan Buddhist, left a note on his bunk quoting Buddhist sacred text about making "a gift of my body." The note continued, "I have done what is legal to stop something that is plainly illegal. Now you cowards can court-martial my dead body." Appellant's note concluded that the "action required" was "All means necessary to implement the intent of the UN and US President[']s intent on Human Rights. Take this flag, it is soiled with unnecessary blood." Appellant fastened a U.S. flag patch (normally worn on the battle dress uniform to identify U.S. forces) in an upside down position to his note with a safety pin. He subsequently "inspected" the National Penitentiary with a loaded M-16 rifle. The Haitian prison officials summoned the military attache from the U.S. Embassy for

Appellant left the hospital without permission, contrary to an order from the psychiatrist evaluating him, to tell LTC Bragg what he saw at the prison. During this discussion, appellant repeatedly and disrespectfully yelled at LTC Bragg and disobeyed orders to be "at ease" and to "be quiet."

At trial and before us, appellant argued he was legally justified in going to the prison, failing to report for duty, leaving the hospital without permission, and disobeying and talking to his superior officer in a disrespectful manner. Because appellant's claim of justification affects most of the assigned errors, we address that issue first.

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assistance in disarming appellant. The attache ultimately persuaded appellant to unload his weapon and leave the prison. Although not raised by either party, we did consider the National Defense Authorization Acts for Fiscal Years 1991 and 1993 (Pub. L. No. 101-510 § 554, 104 Stat. 1485, 1567-69 (1990) and Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992)) (codified at *10 U.S.C. § 1074*), which established procedures for commanders to follow when referring servicemembers for mental health evaluations (see Administrative Law Note, Mental Health Evaluations, The Army Lawyer 32-34 (December 1997) for a more complete discussion of this legislation and implementing regulations). The legislation was concerned with the inappropriate referral for a mental health evaluation of a servicemember as a reprisal against the member for certain whistle-blower type communications that could include filing an IG complaint. Using our fact-finding authority under Article 66, UCMJ, we find that LTC Bragg's emergency referral in this case was appropriate, was based upon his genuine concern for appellant's mental health, and was not a reprisal for appellant's IG complaint.

JUSTIFICATION

Appellant asserts that his otherwise criminal acts were justified because (1) he was following the command intent of the Commander-in-Chief; and (2) he had an affirmative, individual duty under international law to act as he did. The prosecution and defense each presented expert testimony and other evidence before the members concerning whether appellant had any legal duty to act.[6] Appellant requested instructions on the separate defenses of justification and duress. After lengthy discussions throughout the record, the military judge denied any instruction on a justification defense, but did instruct the members on the defense of duress.[7]

Appellant's defense of justification is based on Rule for

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[6] The defense expert evidence consisted primarily of the testimony of Francis A. Boyle, Professor of International Law, University of Illinois College of Law in Champaigne, Illinois. The government called William H. Parks, Special Assistant for Law of War Matters and the Chief of the Law of War Branch, International and Operational Law Division, Office of the Judge Advocate General, U.S. Army, as a rebuttal expert witness.

[7] Appellant's fourth assignment of error is that the military judge erred by failing to instruct on "the justification defense . . . and erroneously instructed the panel on duress." With respect to duress, appellant's brief is unclear whether he contends the instruction was an inadequate substitute for the justification defense; inappropriate altogether; or incorrect in its particulars. For the reasons discussed in our opinion, we find this instruction was not erroneous.

Courts-Martial 916(c) [hereinafter R.C.M.]: "Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful" (emphasis added). Statute, regulation, or order may impose this legal duty. R.C.M. 916 discussion. Thus, the key issue in this case is whether appellant acted pursuant to a legal duty.

Determination of Legal Duty

The determination of whether a "legal duty" exists in a potential justification situation is a question of law to be determined by the trial judge. UCMJ art. 51(b); *United States v. Cottier, 759 F.2d 760, 763 (9th Cir. 1985); United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985);* see also *United States v. Calley, 46 C.M.R. 1131, 1183* (A.C.M.R.) (lawfulness of a superior's order is a question of law), aff'd, *22 U.S.C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973).* In essence, the evidence must, as a matter of law, reach a minimum threshold before a trial judge is required to give an instruction on a defendant's theory of an affirmative defense. "It is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense--here that of duress and necessity." *United States v. Bailey, 444 U.S. 394, 414-15, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980).*

The military judge in this case never expressly ruled, as a matter of law, whether or not the evidence established that appellant acted pursuant to a legal duty.[8] We will examine

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[8] The military judge's decision not to instruct on the defense of justification indicates that, implicitly, he concluded that no legal duty existed. Because we agree with this conclusion, the judge's failure to rule expressly does not entitle appellant to any relief.

each of appellant's claimed sources of this legal duty to determine whether the evidence met the minimum threshold to entitle him to an instruction on the affirmative defense of justification.

Commander-in-Chief's Intent

We reject appellant's claim that his actions were done in the proper performance of a legal duty because he was following the command intent of the President as outlined in his 15 September 1994 speech to the nation. Individual service members do not divine their orders from televised speeches of the President. The President gives a speech to the nation concerning military action to explain why he is sending America's sons and daughters into harm's way and to elicit political and public support for the endeavor. A President's public comments do not constitute operational orders. The President issues his operational orders, including his concept of the operation as Commander-in-Chief, through the National Command Authority[9] down the chain of command to the appropriate operational commander. The commander of the operation then issues implementing orders to the individual commanders and members of the armed forces involved in the operation. Appellant was an experienced soldier with over fourteen years of active military service. He knew the proper channels for receiving orders.

Even if a soldier is convinced that his superiors have misinterpreted the mission, his recourse is to seek clarification

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[9] The National Command Authorities consist of the President and the Secretary of Defense or their duly deputized alternatives or successors. Joint Chiefs of Staff Publication 1, Department of Defense Dictionary of Military and Associated Terms (1 June 1987) at page 243.

1036 (Dec. Term, 1851).[11] A servicemember is obligated to obey an order unless it requires him to do an obviously illegal act or is patently beyond the issuer's authority.

Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.

Calley, 22 U.S.C.M.A. at 543, 48 C.M.R. at Precedents, 296-97 (2d ed. 1920 Reprint) [hereinafter Winthrop]) (emphasis in original). In plain language, a soldier disobeys an order at his own peril.[12]

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[11] In this civil action before the Supreme Court, a marine challenged the legality of his court-martial. The marine refused to continue to perform duties on a deployment after his term of enlistment had expired and raised justification as a defense. The Supreme Court rejected the defense.

[12] "This inference does not apply to a patently illegal order, such as one that directs the commission of a crime." Manual for Courts-Martial, United States (1995 edition), Part IV, para. 14c(2)(a)(i) [hereinafter MCM, 1995]. "But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk." Winthrop at 576. "For it is essential to its security and efficiency that the authority and command confided to the [commanding] officer, when it has been exercised from proper motives, should be firmly supported in the courts of

The success of any combat, peacekeeping, or humanitarian mission, as well as the personal safety of fellow servicemembers, would be endangered if individual soldiers were permitted to act upon their own interpretation of public Presidential statements without specific orders. The effectiveness of military operations, and the lives of a soldier's comrades, depend on precise and timely obedience to orders, especially in tactical environments. Appellant failed to report to his assigned duty-position because he construed his commander's operational priorities as not fully executing the President's intent. A soldier has no such option.

An officer who engages in criminal conduct because he believes his ability to interpret the President's intent and to determine national policy and strategic objectives is superior to that of his civilian and military leadership is not entitled to a justification defense. The mere fact that appellant's advice was ignored does not legally justify his commission of these crimes.[13] We hold as a matter of law that appellant's personal

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justice, as well as on shipboard [or in the field]." *Dinsman, 53 U.S. at 403.*

[13] Similarly, a servicemember's conscience, religious beliefs, moral judgment, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. MCM, 1995, Part IV, para. 14c(2)(a)(iii). See *United States v. Huet-Vaughn, 43 M.J. 105, 114 (1995); United States v. Wilson, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986); United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969).* Appellant's personal and religious convictions concerning the protection of human rights may explain his conduct, but they do not legally justify it. Nothing in the

interpretation of the President's command intent did not create a "legal duty" to inspect the National Penitentiary.

International Law

Appellant also argues his actions were justified because he had a legal duty under international law to act. Appellant contends that the MNF, and hence the United States, became "an occupying power" under international law and thereby assumed control of, and legal responsibility for, the National Penitentiary. He argues that, notwithstanding the permissive nature of the entry of the MNF, the entry was secured under threat of invasion, and therefore duress, so that the rules of occupation should apply.

Whether the MNF and its constituent elements were occupying powers is, in large measure, a nonjusticiable political question. See generally *Gilligan v. Morgan, 413 U.S. 1, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973)* (review of Ohio National Guard "Use of Force" rules was nonjusticiable); *Oetjen v. Central Leather Co., 246 U.S. 297, 301, 62 L. Ed. 726, 38 S. Ct. 309 (1918)* (conduct of foreign relations not subject to judicial review); *United States v. Palmer, 16 U.S. (3 Wheat) 610, 4 L. Ed. 471 (1818)* (whether warships of a foreign country engaged in a civil war committed piracy against U.S. vessels on the high seas was a political question). The legality of the employment of military forces is not reviewable by the judiciary. *Huet-Vaughn, 43 M.J. at 115.* See also *Atlee v. Richardson, 411 U.S. 911, 36 L. Ed. 2d 304,*

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record, other than appellant's own beliefs, indicates that MG Meade, or anyone else in appellant's chain of command, issued orders that were patently beyond their authority or that were clearly illegal.

93 S. Ct. 1545 (1973) aff'g *347 F. Supp. 689 (D.C.E.D. Pa. 1972)* (legality of war in Southeast Asia was political question). Similarly, the determination and recognition of the de facto or de jure government of another country is a political question. *Oetjen, 246 U.S. at 301* (citing *Jones v. United States, 137 U.S. 202, 212, 34 L. Ed. 691, 11 S. Ct. 80 (1890)).*

On matters concerning military operations, courts should defer to the judgments and actions of the President and commanders in the field, at least in the absence of overwhelming facts to the contrary.[14] In this case, the Haitian military government remained in power, the division of responsibilities between it and the MNF was ambiguous, and the degree of control exercised by the MNF was far from absolute. Under these circumstances, this record does not establish a sufficient factual basis to conclude that U.S. forces "occupied" the National Penitentiary.

Even assuming the MNF did constitute an "occupying power," such status imposed no individual legal duty upon appellant to act. Appellant claims that he had a personal legal duty, as a member of the U.S. forces, to prevent human rights violations because he was aware of information which strongly suggested that inhumane conditions existed at the National Penitentiary. Appellant's amorphous argument asserts he

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[14] When courts have decided whether "time of war" exists for various purposes, they have generally looked to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches. *Bas v. Tingy, 4 U.S. (4 Dall.) 37, 1 L. Ed. 731 (1800).* See also *United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954).*

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would be criminally liable under *In re Yamashita, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946)*, a "Nuremberg defense,"[15] and international law generally,[16] if he failed to act.

Appellant's reliance on General Yamashita's case is misplaced. The legal issue in the prosecution of General Yamashita for war crimes after World War II was whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.

Yamashita, 327 U.S. at 14-15. General Yamashita was convicted for failing to do his duty to prevent illegal acts that he knew, or should have known, were committed by persons under his command in violation of the law of war. Appellant had no command authority and no one under his control was

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[15] See generally Nuremberg and the Rule of Law: A Fifty-year Verdict (A Collection of Works Assessing the Legality of the War Crimes Trials of World War II), 149 Mil. L. Rev. (1995).

[16] Appellant cites a litany of human rights provisions from United Nations' resolutions and general provisions from Hague Convention No. IV Respecting the Law and Customs of War on Land, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. However, none of these provisions created a legal duty under general principles of international law which required appellant to inspect the National Penitentiary.

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committing war crimes at the National Penitentiary.

Appellant's purported criminal liability under a "Nuremberg defense" for failing to act is similarly misguided. The Eleventh Circuit, U.S. Court of Appeals, previously rejected this same argument in a prosecution for pouring blood on nuclear missile launchers.

Defendants here misperceive the persons for whom such a Nuremberg "defense" is appropriate. There the German defendants were in positions which required them to participate in sentencing dissidents to death or in utilizing slave labor because domestic law or superior authority ordered them to do so (citations omitted). The question is whether what they were required to do by domestic law could escape international criminal proscription. The War Crimes Tribunal ruled, however, that in certain circumstances those defendants were charged with a duty not to act in accordance with domestic law to avoid liability under international law. Defendants in the case before us stand this doctrine on its head in arguing that a person charged with no duty or responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law. The domestic law simply did not require defendants to do anything that could even arguably be criminal under international law (emphasis added).

United States v. Montgomery, 772 F.2d 733, 737-38 (11th Cir. 1985). See also *Huet-Vaughn 43 M.J. at 114.*

Appellant cites no case, and we can find none, where a servicemember was convicted of a war crime for failing to act under facts similar to this case.[17] Any duty appellant may

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[17] Compare *United States v. Goldman, 44 C.M.R. 471 (A.C.M.R. 1970),* where a company commander in

have had was discharged when he reported the prison conditions to his superiors. Their failure to act, even assuming they were required to do so and that their inaction was criminal, could hardly render appellant criminally liable. We hold as a matter of law that appellant had no personal legal duty to inspect the National Penitentiary to avoid criminal liability under international law.

In summary, appellant requested, and received, an accurate instruction on the defense of duress, properly tailored to the facts of his case. Appellant's evidence failed to meet the minimum threshold to entitle him to an additional instruction on the affirmative defense of justification. *Bailey, 444 U.S. at 414-15.*[18] We also note that the submission of the defense evidence on justification to the members, though not required, may have strengthened appellant's duress defense.[19]

Vietnam was court-martialed for not reporting the rape and murder of a civilian female detainee by members of his company. Captain Goldman was convicted of violating a local regulation for failing to report a "non-battle death" of a female who died from gunshot wounds inflicted while she was in the custody of his unit. *Goldman, 44 C.M.R. at 473.*

[18] Appellant's mistake concerning his legal duties was likewise not a defense. Appellant's erroneous belief that he had a legal duty to inspect the prison was a mistake of law, not fact. He claimed a legal duty that did not exist. Mistake of law is not a defense for appellant's misconduct. R.C.M. 916(l)(1). Appellant has no mistake of fact defense.

[19] Although not clearly articulated, appellant also claims that the military judge should have instructed on the common law defense of necessity: he committed these offenses in order to avoid a far greater harm that would have

UNLAWFUL COMMAND INFLUENCE AND CONFLICTS OF INTEREST

Appellant contends he was denied a fair trial "as a result of interrelated unlawful command influence and conflicts of

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resulted had he complied with the law. Our court has previously held that the defense of necessity does not apply in military law. *United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993).* Accord *United States v. Olinger, 47 M.J. 545 (N.M.Ct.Crim.App. 1997).* In *United States v. Rankins, 34 M.J. 326 (C.M.A. 1992),* our superior court was divided over the question of whether the defense of necessity may apply in courts-martial. Appellant's case provides us no cause to reconsider our holding in Banks. Even if the defense of necessity did apply in courts-martial, it would be of no aid to appellant. One element of the necessity defense is that the "harm threatened must be imminent, leaving no alternative by which to avoid the greater harm." *Rankins, 34 M.J. at 329.* See also *Bailey, 444 U.S. at 410:* "Under any definition of these offenses [necessity or duress] one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." In this case, appellant utterly failed to demonstrate that he had no reasonable alternative to committing his offenses. Under the circumstances, the military judge was not obliged to give a necessity instruction. Furthermore, given the trend toward merging the defenses of necessity and duress, noted in *Bailey, 444 U.S. at 410,* even if a necessity instruction were called for, the tailored duress instruction given by the military judge adequately addressed this issue under the facts of this case.

interest" affecting the entire command including the convening authority, the court and panel members, and prosecution witnesses, but provides few specifics and less evidence.

Appellant presented no evidence of unlawful command influence, either at trial or on appeal. The military judge properly ruled, based upon the evidence presented by the government, that the convening authority had no personal involvement in the profferal of charges and no demonstrated personal interest in the outcome of the case. There is no evidence that MG Meade, or anyone else in a position of authority, attempted in any way to influence any member, any witness, or any other participant in the trial process. The defense had the burden of producing evidence to raise this issue. *United States v. Argo, 46 M.J. 454, 457 (1997); United States v. Drayton, 45 M.J. 180 (1996); United States v. Ayala, 43 M.J. 296 (1995).* Bare allegations and speculation will not suffice. *United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991).* We hold that the defense failed to meet its initial burden of producing sufficient evidence to raise unlawful command influence.

Appellant's conflict of interest challenge contends that MG Meade, several prosecution witnesses, and all but one of the members were disqualified from participating in his case because they also served in Haiti. This contention implicitly has two parts. First, the convening authority and the members could not fairly judge appellant's actions without judging the legality and propriety of their own action or inaction. Second, the convening authority, the witnesses, and the members were biased against the appellant because he had, at least impliedly, accused them of dereliction of duty or worse.

Our conclusion that the defense of justification does not lie in this case, as a matter of law, substantially undercuts appellant's claim that his trial was tainted by conflicts of interest. Appellant failed to raise even a reasonable inference

that MG Meade or any of the members or witnesses violated international law or superior orders. Appellant presented no evidence (as distinguished from speculation) that MG Meade had anything other than an official interest in this case. Similarly, appellant made no specific claim against any prosecution witness regarding conflicts of interest. Bias by a witness, if it exists, is properly the basis of cross-examination and impeachment, not disqualification. See *United States v. Hunter, 21 M.J. 240, 242 (C.M.A. 1986).*

Appellant's assertion that he received an unfair trial because of inherent conflicts of interest is without merit. We address alleged conflicts of interest by the court members in the next section.

CHALLENGES FOR CAUSE

Counsel for both parties and the military judge conducted extraordinarily extensive individual voir dire of each of the twelve detailed court-martial members. Voir dire lasted for two days and consumed over 500 pages of the record of trial. The military judge excused one member, sua sponte, during voir dire. The defense challenged each of the eleven remaining members for cause for numerous reasons including that an acquittal would damage the reputation of MG Meade, the members individually, and the 10th Mountain Division; that many of the members were familiar with several of the key witnesses against appellant and would give their testimony undue weight; that the members had been exposed to and affected by pretrial publicity in the case; and that most of the members evinced an inelastic attitude about a possible sentence in the case. More specific allegations were made against several members individually. The government opposed every challenge. The military judge granted five of the

defense's eleven challenges for cause.[20]

After the government declined to exercise its peremptory challenge, the defense asked the military judge to reconsider his rulings on Colonel (COL) Dubik [21] and Major (MAJ) Arata.[22] The military judge adhered to his original rulings.

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[20] The military judge's reasons for granting these five challenges for cause included inelastic attitudes toward sentencing, lack of impartiality in evaluating LTC Bragg's testimony, and overall inability to evaluate the evidence as impartial members.

[21] We carefully examined the statements of COL Dubik about a brief conversation he had with the division Chief of Staff concerning the investigation of appellant's offenses. Colonel Dubik stated that a few days after appellant's actions, the Chief of Staff told him that there was an ongoing investigation of an incident concerning a captain going to the prison. That was all the Chief of Staff said. Colonel Dubik did not speak to MG Meade about the incident, was not aware of MG Meade's thoughts about it, and did not know any details about what happened. We are satisfied that the military judge did not abuse his discretion in determining that COL Dubik could be a fair and impartial member.

[22] Major Arata was challenged because of an incident he observed at the port facility on his first day in Haiti. During voir dire he explained what happened that day:

The [Haitian] police were coming to the port facility, and they were trying to keep the Haitians - population away from the gates of the port facility so traffic could go in and out, and in one instance they were using pretty violent

Civilian defense counsel, after conferring with appellant, then peremptorily challenged LTC Buckley without explanation.[23]

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methods to keep the people away, an individual was trampled to death and there was a lot of brew-ha-ha (sic) about why we didn't do anything to stop that, and at the beginning our rules of engagement didn't allow us to do that, and within 2 days those rules of engagement changed to what was called a graduated response, where we were allowed to intervene in a graduated manner to stop Haitian-on-Haitian violence.

Major Arata further explained that he did not actually see the individual that was killed; that he wished he had understood the Haitian police crowd control methods sooner; that the incident was not something that weighed terribly on him; and that it would have no effect at all on his ability to judge appellant's case. The military judge found that the tenor of all of MAJ Arata's responses was, "I'd have to hear all extenuating circumstances." The judge found that MAJ Arata repeatedly indicated that he could follow instructions. The judge concluded, "I have no doubt that he can be an impartial court member." After carefully reviewing MAJ Arata's 65 pages of individual voir dire, we agree. The record simply does not substantiate that the incident at the port facility affected MAJ Arata's impartiality.

[23] We find the numerous challenges for cause against LTC Buckley to be unsubstantiated. Further, we note that the defense failed to state that it would have exercised its peremptory challenge against another member if the challenge for cause against LTC Buckley had been granted. Therefore, under R.C.M. 912(f)(4) the defense has waived its challenge for cause against LTC Buckley. See also

Actual Bias

We apply a clear abuse of discretion standard when reviewing a military judge's failure to grant a challenge for cause based upon a claim of actual bias. *United States v. Dinatale, 44 M.J. 325, 327-28 (1996); United States v. Hamilton, 41 M.J. 22, 25 (C.M.A.1994); United States v. McLaren, 38 M.J. 112, 118 (C.M.A. 1993); United States v. White, 36 M.J. 284, 287 (C.M.A. 1993).* Military judges enjoy great deference on actual bias challenges because they are in the best position to "observe the demeanor of court members and assess their credibility during voir dire." *United States v. Daulton, 45 M.J. 212, 217 (1996).* "There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse of discretion, than in ruling on challenges for cause." *United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985)* (citations omitted). That principle is particularly true in this case where the military judge had the benefit of such lengthy and comprehensive voir dire examinations, excused one member sua sponte for cause, and granted five defense challenges for cause.

Court-martial members are not disqualified merely because they have professional relationships with other members or with witnesses. *Daulton, 45 M.J. 212; White, 36 M.J. 284.* Some knowledge of the facts of the case, or an unfavorable inclination toward an offense, is not per se disqualifying. See *United States v. Napoleon, 46 M.J. 279, 283 (1997); McLaren, 38 M.J. at 118.* What is critical is that the member be able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. See R.C.M. 912; *Napoleon, 46 M.J. 279; United States v. Reynolds, 23 M.J. 292 (C.M.A. 1987).*

United States v. Eby, 44 M.J. 425, 426-27 (1996).

We have carefully examined the arguments of counsel and the comprehensive voir dire including the extensive questioning of the members by the military judge who, unlike us, had the opportunity to observe and listen to each member's response. The military judge's rulings and detailed explanations persuade us that he did not abuse his discretion in denying the defense challenges for cause. The record fully supports the military judge's determination that each member could impartially decide the case on its facts in accordance with his instructions; would not give undue weight to the testimony of particular witnesses with whom he might be acquainted;[24] and would consider the entire range of permissible punishments.

Implied Bias [25]

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[24] We particularly examined the statements of MAJ Groefsema concerning his association with LTC Bragg in a Bible study class. Major Groefsema stated that he and his wife were members of a weekly Bible study group with other couples, including LTC and Mrs. Bragg. Major Groefsema did not attend regularly. Major Groefsema estimated that he and LTC Bragg had attended the Bible study at the same time on approximately six occasions. Having carefully reviewed MAJ Groefsema's 47 pages of individual voir dire, we find no basis to find that the military judge abused his discretion in concluding that MAJ Groefsema was able to weigh LTC Bragg's testimony fairly.

[25] There is some question to what extent implied bias is an appropriate basis for challenge. See *United States v. Lavender, 46 M.J. 485 (1997)* (suggesting that a successful challenge for implied bias is a "rare exception"). See also *Napoleon, 46 M.J. at 285* (Crawford, J., concurring in part and in the result); *Dinatale, 44 M.J. at 329* (Cox, C.J., concurring). However, the doctrine appears to remain alive. *Lavender, 46 M.J. at 485*; Daulton, 45 M.J. at 212.

The question here is whether, as seen through the eyes of the public, a member should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N); *United States v. Minyard, 46 M.J. 229, 231-32 (1997); Daulton, 45 M.J. at 217; United States v. Harris, 13 M.J. 288, 292 (C.M.A. 1982).* Our standard of review, again, is abuse of discretion by the military judge, but "we give less deference to the military judge when implied bias is involved." *Minyard, 46 M.J. at 231* (citations omitted).

The total absence of a justification defense removes much of appellant's implied bias argument. The members simply were not confronted with having to condemn appellant in order to justify their own conduct or defend their reputations. We are satisfied that members of the public, aware of all the facts and circumstances, would not conclude that this panel was biased or unfair. We specifically find no implied bias on the part of any member.

Pretrial Publicity

Appellant also claims that his trial was tainted by prejudicial pretrial publicity. Such publicity can infect a trial in two ways. *United States v. Curtis, 44 M.J. 106, 139 (1996).* First, it can create presumed prejudice, when the publicity is prejudicial, pervasive, and inflammatory, and actually saturates the entire community. The publicity in this case fell far short of this threshold.[26] Second, it can create actual prejudice, by

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[26] The publicity in this case, including numerous newspaper articles in papers throughout the country, was mostly generated by appellant and generally portrayed his

generating fixed opinions by the members that they cannot lay aside. We have already found that no such actual bias or prejudice existed here.

It is clear from the record that the defense actively and intentionally generated most of the pretrial publicity in this case. In addition, the defense argued strenuously and unsuccessfully against a government motion that the military judge order twenty potential members and alternates to avoid pretrial publicity. This court is not sympathetic to allegations of unfair pretrial publicity when the defense decides tactically to try its case in the media before the trial. Accord *Montgomery, 772 F.2d at 736.* Each member who was aware of the pretrial publicity said that he would not be affected by anything he may have heard about the case previously. We find no adverse impact on the members' impartiality as a result of the pretrial publicity in this case.

SUFFICIENCY OF THE EVIDENCE

Appellant argues that the evidence was insufficient to support the findings of guilty. Appellant also contends that the findings of not guilty of two related charges, and the convening authority's post-trial dismissal of a third, effectively impeach the remaining findings of guilty.

When reviewing a case for legal sufficiency, the scope of review is whether, viewing the evidence in a light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).* The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having seen the witnesses in person, this court is convinced that the appellant is guilty beyond a reasonable

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actions in a favorable manner.

doubt. *United States v. Turner, 25 M.J. 324 (C.M.A. 1987).* We find that all of the approved findings are legally and factually sufficient.

We further find that the mixed findings in this case are not inconsistent and do not impeach the approved findings of guilty. We also note that, in general, inconsistent verdicts do not impeach findings of guilty. *United States v. Powell, 469 U.S. 57, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984); United States v. Watson, 31 M.J. 49 (C.M.A. 1990).* The mixed findings of guilty in this case demonstrate that the court members fairly weighed the evidence against each specification and convicted appellant only of charges proven beyond a reasonable doubt.

DECISION

We have carefully considered the remaining assignments of error and find them to be without merit. We are entirely satisfied that appellant received a fair and impartial trial. We also find that the approved sentence is appropriate. Accordingly, the findings of guilty and the sentence are affirmed.

Chief Judge COOKE and Senior Judge TOOMEY concur.

FOR THE COURT

Constitutional Provisions, Statutes and Rules

United States Constitution

Fifth Amendment: "No person shall... be deprived of life, liberty, or property, without due process of law..."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor..."

Uniform Code of Military Justice

10 U.S.C. §801.

Art. 1. Definitions

* * *

(9) The term "accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

Sec. 822.

Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by [Seven categories of persons are listed including the President of the United States and several commanding officers]

* * *

(b) If any such commanding officer is an accuser, the court

shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

Sec. 825.

Art. 25. Who may serve on courts-martial

* * *

(2) ... No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

Sec. 836.

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

Sec. 837.

Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with

respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceeding. No person subject to this chapter [*10 USCS §§ 801* et seq.] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter [*10 USCS §§ 801* et seq.] may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Sec. 846.

Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Rules for Court Martial

Rule 504. Convening court-martial

(a) In general. A court-martial is created by a convening order of the convening authority.

(c) Disqualification.

(1) Accuser. An accuser may not convene a general or special court-martial for the trial of the person accused.

(2) Other. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior

competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

Rule 703. Production of witnesses and evidence

* * *

(b) Right to Witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

* * *

Rule 916. Defenses

* * *

(b) Burden of Proof. ... the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist....

* * *

(c) Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

(h) Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to

avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.